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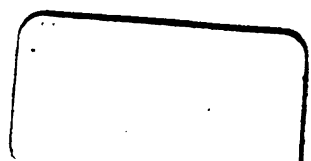
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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

NOVEMBER 23, 1911 — JANUARY 23, 1912

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ERRATA

Page 99, line 3 from bottom, for 45 Wash. read 46 Wash.

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 9629. Department One. November 23, 1911.]

JOHN J. SESNON, *Respondent*, v. JAFET LINDBERG *et al.*,
Appellants, FRANK THATCHER, *as Administrator etc.*,
Defendant.¹

CORPORATIONS—REPRESENTATION—OFFICERS—PROPERTY ACQUIRED—
CONTRACTS—CONSIDERATION—EVIDENCE—SUFFICIENCY. The evidence
sufficiently shows that certain properties and stock were secured by
the president of a corporation for the use and benefit of the corpora-
tion, so as to constitute consideration for the corporation's note to
repay the purchase price advanced, where the corporation took a
formal assignment of the stock of the company holding title to the
properties, and continued in the possession and control of the same.

CORPORATIONS—REPRESENTATION—POWERS OF SECRETARY—NOTES—
RATIFICATION. A corporation cannot question the authority of its
secretary to execute a promissory note, where it retained possession
of stock for which the note was given, and paid interest on the note.

CORPORATIONS—POWERS—PROMISSORY NOTES—SURETY OBLIGATION
—ULTRA VIRES. A corporation executing a note jointly with three
others, for which it received one-fourth of the consideration for
which the note was given, cannot claim that it was only a surety
as to the other makers and that the note was therefore *ultra vires*,
it being authorized to borrow money.

Appeal from a judgment of the superior court for King
county, Neal, J., entered January 27, 1911, upon findings in
favor of the plaintiff, after a trial on the merits before the
court without a jury, in an action upon a promissory note.
Affirmed.

¹Reported in 118 Pac. 900.

Roberts, Battle, Hulbert & Tennant, for appellant Lindeberg.

William H. Gorham, for appellant Sesnon Company.

Harold Preston and George E. de Steiguer, for respondent.

PARKER, J.—This is an action upon a promissory note executed in favor of the plaintiff by Jafet Lindeberg, John J. Sesnon Company, a corporation, by John H. Bullock its secretary, and Cabell Whitehead, now deceased. The note was for \$20,000, dated February 4, 1908, matured August 1, 1908, and interest is provided for therein at the rate of ten per cent per annum. A trial in the superior court without a jury resulted in findings and judgment in favor of the plaintiff, from which the defendants Lindeberg and the John J. Sesnon Company have appealed. The contentions of counsel for appellants involve principally the questions of want of consideration, want of authority of the secretary of the Sesnon Company to execute the note, and want of power in that company to incur such an obligation.

The material facts involved may be summarized as follows: About September 1, 1906, A. E. Boyd, Jafet Lindeberg, Cabell Whitehead, John S. Sanger, and John J. Sesnon purchased a toll road and right of way therefor, which was then partially developed, at Nome, Alaska, for the sum of \$20,000. In order to raise the funds to pay this purchase price, they on that day borrowed from The Alaska Banking & Safe Deposit Company the sum of \$20,000, evidencing their obligation therefor by their promissory note for that sum, signed by all of them, maturing September 1, 1907, and drawing interest at 6 per cent per annum. This note thereafter became the property of the Scandinavian American Bank of Seattle. Respondent Sesnon claims that, in the purchase of the toll road and making payment for it in this manner, he was acting, not for himself, but for the John J. Sesnon Company, a California corporation, of which he was then the president and principal stockholder; while appellants claim

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that Sesnon was then acting in his own behalf. This is the principal controversy of fact involved in the cause, and was found by the trial court in accordance with Sesnon's contention.

The Sesnon Company was then engaged in an extensive lighterage and transportation business at Nome, and the evidence indicates that the company was interested in having this road developed, aside from the mere question of profit which might come to it as a part owner thereof. About this time, these same persons organized the Seward Peninsula Construction Company, a corporation, and transferred the toll road to it, with the understanding that each of them should receive one-fifth of the stock of that company. Soon thereafter the stock which was to go to Sanger passed by agreement to his associates, so that, so far as the records of that corporation showed, Boyd, Lindeberg, Whitehead and Sesnon each became the owner of one-fourth of that stock. This stock was about that time placed in the hands of either Sanger or Whitehead, with a view of selling the same in eastern markets. This purpose, however, does not appear to have been successfully carried out. It seems quite certain from the evidence that Sesnon never had in his possession any certificate of stock which stood in his name, except to assign it about this time for the purpose stated. All of this is claimed to have been done by Sesnon for the use of the Sesnon Company, as was found by the trial court.

Thereafter, about October, 1907, Sesnon sold his stock and interest in the Sesnon Company, though there was no election of his successor as president until May, 1908. We think, however, that the evidence warrants the conclusion that he did not assume to act as president after his sale of stock. Soon thereafter, Sesnon, being in Seattle, there received notice from the Scandinavian American Bank calling for payment of the note given by himself and his associates September 1, 1906, that note having matured September 1, 1907. The interest upon that note appears to have been

paid, but by whom is not clear from the evidence. It was not, however, paid by Sesnon, and at this time it apparently required only \$20,000, the amount of the principal, to satisfy it. It is, of course, plain that Sesnon, by reason of his individual signature upon the note, was liable thereon to the bank, even though in all the matters culminating in that indebtedness he was acting for the use of the Sesnon Company. It was then, in Seattle, agreed between Lindeberg, Whitehead, John H. Bullock, as secretary of the Sesnon Company, and Sesnon—Boyd, the other maker of the first note being absent, and Sanger being out of the matter because of the previous transfer of his stock to the others—in substance as follows: Sesnon was to advance \$20,000 for the payment of the note. Lindeberg, the Sesnon Company, and Whitehead were to execute their note for that sum, payable to Sesnon August 1, 1908, drawing interest at ten per cent per annum. Boyd being absent, and therefore it being impracticable to secure his signature to the new note at that time, the first note was to be indorsed by the bank, without recourse, to J. E. Chilberg in trust for Lindeberg, the Sesnon Company, and Whitehead, the makers of the new note. This resulted in preserving evidence of Boyd's obligation of contribution to the makers of the new note for his share of indebtedness under the first note, and was, we think, the real purpose of the taking of that note in trust by Chilberg. The stock of the Seward Peninsula Contruction Company which had been apportioned to Sesnon not being present, and the parties not seeming to have a very clear notion as to how the record title of that stock appeared, Sesnon was then, in consideration of being relieved from obligation upon the first note, to assign to the Sesnon Company this stock by formal instrument in writing. This arrangement was thereupon carried out by executing the new note and other papers as agreed, Sesnon thereupon paying to the bank \$20,000, the bank assigning the first note to Chilberg in trust for the makers of the new one, and the new note deliv-

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ered to Sesnon. The new note was dated February 4, 1908, though the arrangements were not entirely completed and the note delivered to Sesnon until about May 12, 1908.

Thereafter, in May, 1908, John H. Bullock was elected president of the Sesnon Company, of which company he had previously been secretary and treasurer. Thereafter, about August 1, 1908, Bullock, as president of the Sesnon Company, paid to Sesnon interest upon this second note from its date until July 31, 1908, amounting to \$980.74. Thereafter Lindeberg and Whitehead reimbursed the Sesnon Company to the extent of the proportion of such interest they were obligated to pay. The stock of the Seward Peninsula Construction Company which was apportioned to Sesnon, including that going to him from Sanger, was in the possession of the Sesnon Company at Nome, Alaska, prior to the execution of this new note by Lindeberg, Whitehead, and the Sesnon Company to Sesnon for the \$20,000 he advanced to pay the first note, and the Sesnon Company has ever since retained that stock and never made any offer to return the same to Sesnon. In December, 1908, the board of directors of the Sesnon Company adopted a resolution assuming to disavow the act of Bullock as secretary in executing the note with Lindeberg and Whitehead to Sesnon, but no offer of the return of the stock to Sesnon was made in connection with that resolution.

It is first contended by counsel for appellants that the acquiring of the interest in the toll road, and thereafter the stock in the Seward Peninsula Construction Company by Sesnon, was not for the use of the Sesnon Company, and, therefore, the indebtedness evidenced by the first note never became in any sense an obligation of the Sesnon Company. This seems to be the basis of the argument that there was no consideration moving to the Sesnon Company for the incurring of the obligation evidenced by its execution of the new note with Lindeberg and Whitehead to Sesnon, the note not here sued upon. If this question rested alone upon the

evidence which relates directly to what occurred at the time of acquiring the interest in the toll road and stock by Sesnon, such argument might be put forward with some degree of plausibility, since that evidence is somewhat in conflict. But when later events shown by the evidence are considered, such as possession by the Sesnon Company of the stock of the Seward Peninsula Construction Company which had been apportioned to Sesnon, the formal assignment of that stock over to the Sesnon Company at the time of the giving the new note to Sesnon, the continued possession and exercise of ownership over that stock by the Sesnon Company, the failure of the Sesnon Company to ever offer any return of that stock, the execution of the new note by the Sesnon Company with Lindeberg and Whitehead, in effect evidencing a loan from Sesnon to them of \$20,000 which was used in paying the first note, we think the trial court was fully warranted in concluding that the acquisition of the toll road and stock in the Seward Peninsula Construction Company was at all times considered by the parties as being for the use of the Sesnon Company, and not for Sesnon personally, though in form the first note evidencing the obligation therefor was a personal obligation against Sesnon, in so far as the rights of the bank are concerned.

It is next contended that John H. Bullock as secretary was without power or authority to execute the note to Sesnon in the name of the Sesnon Company. If we were to view this question solely as one of authority existing at the time of the execution of that note, entirely apart from subsequent events, it would present an interesting and somewhat debatable question. We do not think, however, the rights of the parties rest upon a solution of that question viewed from that standpoint. The subsequent events, we think, clearly show a ratification of Bullock's execution of this note. The principal facts, as we have seen, pointing to their ratification are the payment of interest on the note by Bullock after he became president of the Sesnon Company,

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from the funds of that company, and the retention by that company at all times thereafter of the stock of the Seward Peninsula Construction Company which had been formally assigned to it by Sesnon at the time of the execution of that note, if not long before. The following decisions of this court support this view: *Dexter Horton & Co. v. Long*, 2 Wash. 435, 27 Pac. 271, 26 Am. St. 867; *Allen v. Olympia Light & Power Co.*, 13 Wash. 307, 43 Pac. 55; *Windsor v. St. Paul, Minneapolis & M. R. Co.*, 37 Wash. 156, 79 Pac. 613; *McKinley v. Mineral Hill Consol. Min. Co.*, 46 Wash. 162, 89 Pac. 495. That the retention of the stock of the Seward Peninsula Construction Company by the Sesnon Company under the circumstances here shown would render it liable upon this note, even though such obligation was incurred by acts beyond its lawful powers, is indicated by the following decisions of this court: *Tootle v. First Nat. Bank*, 6 Wash. 181, 33 Pac. 345; *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 45 Pac. 316; *Graton & Knight Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879.

It is further contended that the attempted making of this note by the Sesnon Company was *ultra vires* and beyond the powers of that company, because it in effect makes it a surety upon that note, in so far as the obligations of the other makers thereof is concerned. It is argued that the Sesnon Company's obligation, growing out of the facts we have reviewed, in no event exceeded one-fourth of the original purchase price of the toll road and the stock of the Seward Peninsula Construction Company. If the Sesnon Company had signed this note merely as an accommodation endorser or maker, there might be some foundation to this contention. But in the execution of the note, there had, either then or previously, passed to the Sesnon Company a substantial consideration, to wit, the stock of the Seward Peninsula Construction Company. The Sesnon Company was no more surety for the other makers of the note than they were sureties for it. It is plain that the note was given in the

mutual interests of all three of its makers. We think there was such a substantial consideration flowing to the Sesnon Company that it cannot be said that the giving of the note was such a contract of suretyship as falls without the corporate powers of that company. We find in its articles of incorporation introduced in evidence, among other powers there enumerated, the following: "Borrowing and lending money. Buying, selling and dealing in stocks, bonds and securities of other corporations, public and private." *Wheeler, Osgood & Co. v. Everett Land Co.*, *supra*, and *Low v. Central Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629, lend support to this view, and we think that *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. 1058, is not in conflict therewith, in view of the facts of that case.

In addition to the above noticed contentions, appellant Lindeberg contends that the evidence shows that the stock of the Seward Peninsula Construction Company awarded to him was taken by him, one-fourth thereof in trust for Sesnon, and one-fourth only for himself, and that in no event should the judgment in this case go against him for more than that proportion of the debt here sued upon. This question of fact was resolved against Lindeberg by the trial court upon evidence that was somewhat conflicting, but which we think was ample to support the trial court's conclusion. It is therefore not necessary to discuss the question of Lindeberg's rights and obligation, in the light of subsequent events.

There are many other minor facts appearing in the evidence which we have not noticed. These, however, as we view them, would only lend additional support to our conclusions touching the original intentions of the parties, Bullock's authority as secretary in executing the note for the company, and the ratification of its execution by the company thereafter.

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We conclude that the judgment must be affirmed, and it is so ordered.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 9920. Department One. November 23, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
D. A. HATFIELD, *Appellant*.¹

ESCAPE—ATTEMPT—AUTHORITY FOR CUSTODY—FINAL JUDGMENT—COMMITMENT—NECESSITY. One imprisoned in the county jail after a final judgment of conviction and sentence authorizing his detention, is lawfully in custody and may be guilty of an attempt to escape jail, although the sheriff did not have in his possession any commitment or written evidence of authority to detain him; Rem. & Bal. Code, § 2207, merely providing that such a commitment shall be sufficient authority to the sheriff to execute sentence, not that it is essential.

ESCAPE—EVIDENCE—SUFFICIENCY. Evidence is sufficient to establish an attempt to escape jail by force, where it appears that the defendant was confined in the county jail under conviction and sentence, that he had concealed and in his possession saws suitable for cutting iron or steel, that a short time before he counseled escape with other prisoners, and that he guarded the door of his cell while a bolt was being heated and sawed by another prisoner in his cell.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 20, 1911, upon a trial and conviction of attempting to escape jail. Affirmed.

Sidney J. Williams and *William R. Bell*, for appellant.

John F. Murphy, *Hugh M. Caldwell*, and *H. B. Butler*, for respondent.

PARKER, J.—Appellant brings this cause here seeking a reversal of his conviction in the superior court for King county, upon an information charging him and George W.

¹Reported in 118 Pac. 893.

Workman, jointly, with the crime of attempting to escape from prison, as follows:

"He, said D. A. Hatfield, in the county of King, state of Washington, on the 12th day of May, 1911, was confined and held in a prison, to wit, the King county jail, located in the city of Seattle, in said county and state, on a charge, conviction and sentence of felony, to wit, forgery in the first degree theretofore duly made, rendered and imposed against him in cause numbered 5,589 in the superior court of the state of Washington for King county, and was then and there confined and held in said prison on a charge of felony, to wit, forgery in the first degree, theretofore duly made against him in said cause numbered 5,622 in said superior court, and he, said George W. Workman, was then and there confined and held in said prison on a charge, conviction and sentence of felony, to wit, carnal knowledge of a child, duly made, rendered and imposed against him in cause numbered 5,779 in said superior court. And they, said D. A. Hatfield and George W. Workman, and each of them, while then and there being so confined and held in said prison, did then and there wilfully, unlawfully, feloniously and by force, attempt to escape from said prison by obtaining from outside said prison, through means which are to the prosecuting attorney unknown, acid, saws and a blow pipe, and by then using and attempting to use said acid, blow pipe and saws in sawing and cutting the iron bolts and bars of said prison, for the purpose of making an aperture therein, through or by means of which they, or either of them, might escape."

It is first contended by counsel for appellant that this information does not charge a crime, in that it fails to show that, at the time of the alleged attempted escape, there was any written evidence, in the form of a warrant or commitment, for appellant's imprisonment, in the possession of the sheriff of King county. This same contention is made in appellant's behalf upon a challenge to the sufficiency of the evidence to sustain his conviction, the evidence failing to show any warrant or commitment in the hands of the sheriff authorizing the imprisonment. The evidence does show, however, that appellant had been convicted and sentenced, as

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stated in the information, a short time prior to his alleged attempted escape, and had not then been taken to the penitentiary, to which he had been sentenced. It was upon this conviction and sentence that appellant was held in custody and imprisoned in the county jail by the sheriff. We will discuss both of these contentions together, since our view of the necessity of the sheriff having in his possession written evidence of his authority to so detain appellant, to constitute such detention and imprisonment lawful, will dispose of both contentions. Our attention is directed to Rem. & Bal. Code, § 2207, providing:

“When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript, from the minutes of the court, of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly.”

This section, it is insisted, prescribes the sole evidence of authority by which a defendant can be legally held in custody after his conviction, and that, unless the sheriff actually has in his possession a commitment in this form, his detention of such defendant is unlawful. Upon this theory it is argued that appellant was neither charged nor proven to be lawfully imprisoned at the time he is alleged to have made his attempted escape, and, therefore, could not be guilty of attempting to escape from lawful imprisonment.

Whatever merit there might be in a contention of this nature if we were dealing with the authority by which an officer held a defendant who is merely charged with crime, we think such a contention cannot be successfully maintained in this case, where we have a final judgment of a court of general jurisdiction authorizing the detention and imprisonment. It has been generally held that a defendant imprisoned, in the custody of a proper officer, upon a conviction by a court of general jurisdiction, will not be released upon habeas

corpus merely because of a defective commitment in the hands of such officer, when the judgment of conviction authorizes such imprisonment. This view is rested upon the theory that, when a valid judgment of imprisonment is rendered against a defendant, that judgment becomes the real authority for such imprisonment, and the commitment, which under our law is merely a certified copy of the judgment, is only evidence of such authority. Surely a certified copy of such a judgment is no higher evidence of an officer's authority to act thereunder than the judgment itself. The officer is no doubt entitled to a proper commitment in his possession for his own protection, but if he acts within the authority and duty imposed upon him by the judgment, he will not be held to have acted unlawfully simply because of the failure to have the evidence of his authority in his possession in some particular form; especially when the officer having the custody of the defendant is the executive officer of the court rendering the judgment. Section 2207, Rem. & Bal. Code, above quoted, only says that the conviction, certified as therein provided, "shall be sufficient authority for such sheriff to execute the sentence." There is nothing contained in that section, even inferentially, rendering the sheriff's acts in compliance with the judgment unlawful, should he act thereunder without a commitment in this form.

The situation here is quite unlike a judgment requiring an execution for its enforcement, or a mere charge of crime requiring a warrant authorizing the arrest of the accused before he can be arrested and detained. This judgment, by its very terms, directs what shall be done with the defendant. It is in effect self-executing, so far as the executive officer's authority thereunder is concerned. The very form of the commitment prescribed by § 2207 assumes this self-executing nature of the judgment. It seems to us that the lawfulness of appellant's imprisonment may be determined by the answer to the question, Could he, at the time of his alleged attempted escape, have secured his release by habeas

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corpus? If not, of course, his imprisonment by the sheriff was then lawful. We think that the existence of the judgment, evidenced to the court upon such habeas corpus hearing in any proper manner, would have prevented appellant's release, because thereby the imprisonment would be shown to be lawful. This view finds support in the following authorities: 2 Spelling, Injunctions and other Extraordinary Remedies (2d ed.), §§ 1214, 1298; *Howard v. United States*, 75 Fed. 986, 34 L. R. A. 509; *People ex rel. Trainor v. Baker*, 89 N. Y. 460; *In re Thayer*, 69 Vt. 314, 37 Atl. 1042; *Sennott's Case*, 146 Mass. 489, 16 N. E. 448, 4 Am. St. 344.

Counsel for appellant rely upon *State v. Hollon*, 22 Kan. 580, as supporting the opposite view. That case may not be easily distinguishable from the one before us, but we are nevertheless constrained to adopt the view that the lawfulness of appellant's imprisonment does not rest upon the written evidence, or want thereof, in the possession of the sheriff, but upon the final judgment of conviction under which he was held at the time of his alleged escape. We conclude that the record before us shows that appellant was both charged and proven to be lawfully imprisoned at that time.

It is next contended that the evidence does not show any attempt by the defendant to escape by force, which is the substance of the charge against him. We find testimony in the record direct and certain to the fact, that appellant had possession of, and concealed in the jail, several saws suitable for cutting iron or steel; that a short time prior to the attempted escape, he counseled and advised escape with other prisoners; that in his cell, which was also occupied by Workman with whom he was charged, and one other prisoner, there was concealed an alcohol lamp and a blow pipe; that on the day charged, this blow pipe was being used by Workman, apparently in an attempt to heat a bolt in the rear grating of their cell; that at the same time, appellant was standing in the door of the cell leading into the corridor where many other prisoners were free to come and go, in

such position as to be apparently guarding the doorway; that he did then attempt to prevent another prisoner from coming into the cell; that soon thereafter a bolt in the rear grating of the cell, at or very near the place where Workman was seen using the blow pipe, was found with its head sawed nearly one-half off, the groove being such as to fit at least some of the saws which had been concealed in the jail by appellant. The truth of this evidence was for the jury to determine, and, if believed by them, we think it was sufficient to warrant the conclusion that appellant actually participated in the use of force in an attempt to escape with Workman.

Exceptions were taken to the refusal of the court to give certain instructions requested by appellant's counsel which were refused by the court. A reading of those given by the court, we think, covered the same ground, in so far as the facts of the case required.

We find no error in the record. The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9815. Department Two. November 24, 1911.]

SUMNER IRON WORKS, *Respondent*, v. WINKLEMAN LUMBER
COMPANY, *Appellant*.¹

APPEAL—REVIEW—FINDINGS. Upon a direct controversy between the evidence of the parties, both of whom are about equally corroborated, findings of the trial judge, who heard and saw the witnesses, will not be disturbed on appeal.

SALES—IDENTITY OF BUYER—EVIDENCE—SUFFICIENCY. The sale of goods to defendant corporation is sufficiently shown where the order was given by its president, who was also an officer of another corporation doing business in the same office, it made the first payment thereon by its check, the goods were charged to it, and no claim was made until suit brought that the sale was made to the other corporation whose business had been confused with that of the vendee.

¹Reported in 118 Pac. 886.

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Opinion Per CROW, J.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 4, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Hayden & Langhorne, for appellant.

Cassius E. Gates, for respondent.

CROW, J.—Action by Sumner Iron Works, a corporation, against Winkleman Lumber Company, a corporation, to recover the purchase price of machinery sold. From a judgment in plaintiff's favor, the defendant has appealed.

The only issue presented is whether the sale was made to appellant or to Central Mill Company, another corporation. The Sumner Iron Works has its principal headquarters at Everett, Washington. The Winkleman Lumber Company and the Central Mill Company are located at Tacoma, where they occupy the same business office. One Ray Winkleman is president and treasurer of the Winkleman Lumber Company and also vice president and treasurer of the Central Mill Company. Respondent's manager testified that the sale was made in April, 1910, to the Winkleman Lumber Company, through Ray Winkleman, who was then at Everett, Washington; that Ray Winkleman ordered the shipment made to the Central Mill Company at Tacoma; that it was then agreed that a partial payment of \$300 should be made in advance; that on April 21, 1910, the Winkleman Lumber Company wrote respondent asking the cause of a delay in shipment; that respondent, answering by letter, stated the shipment would be made when the advance payment was received; that Winkleman Lumber Company forthwith remitted its check for \$300; that shipment was then made to the Central Mill Company as directed; that the remainder of the purchase price was then charged to the Winkleman Lumber Company; and that respondent never knew the Central Mill Company as purchaser.

A number of letters were admitted in evidence, some of

them between respondent and the Winkleman Lumber Company, and others between respondent and the Central Mill Company. The former indicate a sale from respondent to the Winkleman Lumber Company, while the latter indicate a sale to the Central Mill Company. Appellant's president, Ray Winkleman, testified the sale was made to Central Mill Company; that it and the Winkleman Lumber Company occupied the same office and employed the same stenographer, who occasionally made mistakes in mixing their correspondence, and that the advance payment of \$300 was inadvertently made and remitted by the Winkleman Lumber Company while Ray Winkleman was absent from Tacoma. The evidence, both written and oral, was conflicting. Respondent's manager positively testified that the sale was made to appellant. Ray Winkleman as positively testified to the contrary. Portions of the correspondence and the advance payment of \$300 sustain respondent's contention. Other portions of the correspondence and the manner of shipment tend to sustain that of appellant. The trial court saw the witnesses, heard them testify, passed upon their credibility, and found the sale was made to appellant. We cannot disturb this finding.

It is apparent that the business affairs of appellant and Central Mill Company have in some manner become confused and intermingled. Appellant concedes it paid respondent \$300 on the purchase price, but fails to show that, at any time prior to the commencement of this action, it advised respondent of its alleged mistake in so doing. It knew respondent charged it with the remainder of the purchase price, and was demanding payment accordingly. Appellant's president, Ray Winkleman, on cross-examination, testified as follows:

"Q. You got a statement of this account made out to the Winkleman Lumber Company right along? A. I don't know as to that. Q. You cannot remember any particular time when you told Mr. Sumner [respondent's manager] that

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this should have been charged to the Central Mill Company? A. Except the time they brought suit. Q. I mean prior to the bringing of the suit? A. No, sir. Q. Prior to November? A. No, sir. Q. Who sent the three hundred dollar check? A. That check was sent when I was in the east. Q. That was a Winkleman Lumber Company check? A. Yes, sir; I will tell you about that. I was treasurer of the Winkleman Lumber Company and the Central Mill Company, and I handled the finances of both companies through one company up to September 23rd."

Appellant now contends that the mistake in writing letters and making the remittance in its name was made by a lady stenographer employed by both companies, but she did not sign the check. It was signed by one I. Winkleman, who was not produced as a witness and whose absence was not explained. There is no suggestion that a claim against the Central Mill Company would not be just as valuable as a like claim against appellant. Nor is there any apparent motive which would induce respondent to seek a recovery from the wrong corporation. Some question is raised as to an item of \$12 for a pulley which appellant contends was purchased by the Central Mill Company, but our conclusion from all the evidence is that it was intended for use in operating the machinery sold to appellant. If there has been any confusion of appellant's accounts with those of the Central Mill Company, such confusion has resulted from appellant's carelessness, for which respondent cannot be held responsible.

The findings of the trial court are sustained, and the judgment is affirmed.

DUNBAR, C. J., ELLIS, and MORRIS, JJ., concur.

[No. 9869. Department Two. November 24, 1911.]

STEVE O'BRIEN *et al.*, *Appellants*, v. W. S. McKELVEY *et al.*,
Respondents.¹

APPEAL—DECISION—LAW OF CASE. A decision on appeal that a demurrer was properly overruled, and that certain evidence was improperly excluded, becomes the law of the case, and error cannot be assigned thereon upon a second appeal.

EVIDENCE—EXPERTS—HANDWRITING—QUALIFICATION OF EXPERTS. Employees in the county auditor's office are qualified as experts to compare signatures and give an opinion as to whether they were written by the same person, where one of them had had experience in inspecting instruments and signatures thereto offered for record, and the other was a clerk and bookkeeper who had been a receiving and paying teller in a bank.

DEEDS—EXECUTION—FORGERY—EVIDENCE—SUFFICIENCY. The forgery of a deed is sufficiently established where qualified experts compared the signatures with one proven to be genuine by a witness who saw the grantor sign, and were of the opinion that they were not written by the same person, and no attempt was made by the other parties to disclose the circumstances or explain the absence of the original deed.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 3, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

H. E. Foster, for appellants.

Tom Alderson, for respondents.

Crow, J.—This action has heretofore been in this court. *O'Brien v. McKelvey*, 59 Wash. 115, 109 Pac. 337. A statement of the pleadings and issues may be found in our former opinion. The plaintiffs' demurrer to the affirmative answer and cross-complaint of the defendant W. S. McKelvey was overruled. On trial, judgment was entered in plaintiffs'

¹Reported in 118 Pac. 885.

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favor, but on defendants' motion, a new trial was granted, and the former appeal was prosecuted from the order granting the new trial. The plaintiffs, as appellants, then contended that the trial court erred in overruling their demurrer to the affirmative answer and cross-complaint, and in granting a new trial, but this court held the affirmative defense sufficient, and also held that the new trial was properly granted by reason of the erroneous exclusion of evidence offered by the defendants. After remittitur and upon a retrial, the court made findings in favor of the defendants, and entered a decree by which it was adjudged that the purported deed from Frank Elsholtz to Lena Vosberg, through which appellants deraigned their alleged title, was a forgery; that Elsholtz is still the owner of the real estate; that appellants have no right or interest therein, and that the action should be dismissed. The plaintiffs have again appealed.

It is unnecessary to restate the pleadings, as they appear in our former opinion. We will observe that appellants, who deraign title from and through a deed alleged to have been executed and delivered by Frank Elsholtz to Lena Vosberg, prosecuted this action in ejectment to obtain possession of the real estate from respondents W. S. McKelvey and Ema-line McKelvey, his wife. W. S. McKelvey, claiming to be in possession as agent for Elsholtz, alleged that the purported deed from Elsholtz to Lena Vosberg was a forgery. The controlling issue on the last trial was whether the disputed deed was a forgery. The respondents were permitted to introduce evidence rejected on the former trial, which this court held competent and admissible. Upon this and other competent evidence, a finding was properly made that the deed was a forgery. Appellants, upon this appeal, again contend that the trial court erred in overruling their demurrer to the affirmative defense and cross-complaint of the respondent W. S. McKelvey. We cannot consider this assignment. It was settled upon the former appeal adversely to appellants' present contention, and our former ruling is now the law of

the case. Nor can we sustain appellants' further contention that the trial court erred in admitting evidence offered by respondents. The evidence of which complaint is made is the identical evidence which, in our former opinion, we held should have been admitted on the first trial. We then said:

"The respondents were entitled to prove and offer in evidence the signature of Elsholtz, and to have their experts, if they could qualify, give their opinion as to whether he had signed the deed, based upon a comparison of his proven signature with their recollection of the signature to the deed."

It will thus be seen that the only possible question on this appeal is whether the experts, whom respondents produced on the last trial, were qualified to testify. Appellants contend they were not. This contention cannot be sustained. They were employed in the office of the county auditor at the time the deed was filed for record. One of them was repeatedly called upon to examine signatures to various instruments and instruct other employees in the office as to the manner in which they were to be recorded. The other had occupied a number of clerical positions, where he had inspected written instruments and signatures, had been employed in a railway office, and had been clerk, bookkeeper, receiving teller, and paying teller in a bank. These two witnesses, at respondents' request, compared the signature on the original deed with a proven genuine signature of Frank Elsholtz, and testified that, in their opinion, they were not written by the same person. The witnesses were competent, and their testimony was admissible. The original signature which they compared with that on the deed was shown to be genuine by a witness who himself saw Elsholtz write it.

Appellants further insist the evidence was not sufficient to prove the forgery. They rested their entire case on a certified copy of the recorded deed. They made no attempt to disclose the circumstances surrounding the alleged sale and

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conveyance, nor did they attempt to explain the absence of the original deed, or show they had made any effort to produce it. From the entire record, we conclude the forgery was established by the overwhelming weight of evidence, and that no prejudicial error has been committed.

The judgment is affirmed.

DUNBAR, C. J., ELLIS, and MORRIS, JJ., concur.

[No. 9775. Department Two. November 24, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
THOMAS MALLAHAN, *Appellant*.¹

CRIMINAL LAW—EVIDENCE—ACCOMPLICE. One who was present after a burglary when the participants divided up the spoils, is not an accomplice.

CRIMINAL LAW—EVIDENCE—ACCOMPLICE—CORROBORATION. A conviction of burglary may be had upon the uncorroborated testimony of an accomplice.

CRIMINAL LAW—EVIDENCE—ACCOMPLICE—SENTENCE—MATERIALITY. Where an accomplice who had pleaded guilty had testified that no inducements had been held out to him to testify against the defendant, it is immaterial what his sentence was, and evidence thereof is properly excluded.

WITNESSES—EXAMINATION—REPETITIONS. Where a matter has been fully gone into, it is not error to refuse to permit the witnesses to be further interrogated along the same lines.

BURGLARY—IDENTIFICATION OF PROPERTY—EVIDENCE—ADMISSIBILITY. Upon a prosecution for the burglary of a millinery store, in which a large number of plumes were taken, it is proper to allow the state to show that plumes found at the home of the defendant were of the same kind and similar in appearance to the plumes stolen, where that was the best evidence of identification obtainable.

CRIMINAL LAW—EVIDENCE—ALIBI—REBUTTAL. Upon a prosecution for a burglary charged on October 4, in which the defense was an alibi, and defendant was shown to have been at home during the evening and night of that day, it is proper to reopen the case to

¹Reported in 118 Pac. 898.

allow the state to show that the burglary was committed in the early morning of the 4th.

CRIMINAL LAW—EVIDENCE—REBUTTAL. Upon a prosecution for burglary, where defendant and one jointly indicted testified that they had no previous acquaintance, the state on rebuttal may show that they had been seen together prior to that time.

CRIMINAL LAW—TRIAL—ADJOURNMENT. Error cannot be predicated on the denial of a request to have the court and jury go to a witness confined to bed for the purpose of taking her testimony.

CRIMINAL LAW—ALIBI—EVIDENCE—RELEVANCY. Where defendant claimed that he was confined to his home by an injury to his knee, at the time of an alleged burglary, and wore a rubber bandage, which he offered in evidence, it is not error to exclude it, there being no dispute as to his wearing the same.

CRIMINAL LAW—APPEAL—REVIEW—MISCONDUCT OF COUNSEL. Error cannot be predicated upon remarks of the prosecuting attorney, made upon objecting to a motion in the presence of the jury, where no request was made to instruct the jury as to their effect.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. One general exception to the instructions given is insufficient to secure a review of error in certain instructions.

Appeal from a judgment of the superior court for King county, Main, J., entered January 21, 1911, upon a trial and conviction of burglary in the second degree. Affirmed.

Welch & Crotty and Osmond Walker, for appellant.

John F. Murphy, Alfred H. Lundin, and Reah M. Whitehead, for respondent.

MORRIS, J.—Appellant was charged jointly with John A. Wells and two others with burglary in the second degree, in breaking into the store of the Wonder Millinery Company, at Seattle, on October 4, 1910. He was convicted, and appeals.

John A. Wells, previously to the trial of appellant, had pleaded guilty, and had been sentenced to a term at the state reformatory at Monroe, from which place he was brought by the state and used as a witness against appellant. The first errors assigned grow out of this testimony. It is contended

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that Wells was an accomplice, and there was no sufficient corroborating testimony to sustain a conviction. It is also urged that a witness named Hansen, who was present at the home of Wells subsequent to the burglary, when the parties committing the crime divided up the spoils, was also an accomplice. Hansen was in no sense an accomplice. The fact that he subsequently learned of the crime from those engaged in its commission does not make him an accomplice in its commission. Neither is it required in this state that the testimony of an accomplice be corroborated before a conviction can be had. We have always adhered to the rule that no corroboration is necessary. *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Jones*, 53 Wash. 142, 101 Pac. 708; *State v. Ray*, 62 Wash. 582, 114 Pac. 439; *State v. Stapp*, 65 Wash. 438, 118 Pac. 337; and *State v. Dalton*, 65 Wash. 663, 118 Pac. 829.

It is next contended that the court erred in not permitting appellant to show the inducements held out to Wells to obtain his testimony. The record does not show any such refusal. Counsel for appellant was permitted to ask this witness if he had any understanding with Captain Tennant of the police department as to what his sentence would be if he testified against this appellant, or whether Captain Tennant requested his aid in sending appellant to the penitentiary. The record shows no attempt on the part of the state or the court to hinder appellant in obtaining answers to these questions, until at the last the witness was asked what his sentence was, which was objected to and the objection sustained. We find no error in this ruling. The witness had already testified no inducements had been held out to him, nor was there any understanding as to his sentence. It was therefore immaterial what his sentence was, since there was no showing of any understanding or inducement regarding it.

The only other objection made and sustained to this line of inquiry was, after counsel for appellant had asked his questions and obtained answers, he incorporates the fact he

was seeking to obtain an admission of from the witness into a final question. The matter had been fully gone into, and there was no error in the court refusing to permit the witness to be again interrogated upon the same matter.

At the time of the burglary, a large number of plumes of the value of about \$5,000 were taken. The state produced some plumes found at the home of appellant, and when Mr. Cressman of the millinery company was upon the stand, he was asked: "If any one of these plumes here are similar to the plumes—to the ones stolen from the Wonder Millinery Co." Counsel for appellant objected as incompetent, irrelevant, and immaterial, which objection was overruled, and such ruling is here assigned as error. The theory of counsel, as gathered from his argument in support of his objection, was that there was no identification of the plumes shown the witness as the plumes that were stolen, and that they could not be identified by their similarity. It was proper for the state to show the plumes produced were of the same kind and character and similar in appearance to the ones taken. A large number were taken. There were probably no special identification marks upon them by which they could be identified from similar plumes. The fact that they were similar and of the same general appearance was, therefore, the best evidence obtainable, and, as such, its admission was proper, leaving the question of its weight for the jury.

In *State v. Murphy*, 15 Wash. 98, 45 Pac. 729, a prosecution for stealing cattle, in seeking to identify the alleged stolen animal, evidence that the animal in question was "to the best of his knowledge and belief" the one stolen, was held proper, upon the theory that the weight to which the testimony was entitled was for the jury, and not a question of law to be decided by the court. In *State v. Beeman*, 51 Wash. 557, 99 Pac. 756, the charge was burglary; the thing stolen a feather bed. The state was permitted to show that the bed was found in the possession of defendant; that the feather bed had been removed and the tick concealed in

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a barrel of dirty clothes, and that defendant had in his possession several flour sacks partially filled with feathers. A statement of the rule under which this evidence was competent may be found in vol. 1, Wigmore on Evidence, § 660.

The next error assigned is the admission of certain evidence in rebuttal. The defense was an alibi. The time was charged as October 4. The defense had introduced testimony to the effect that appellant was at his home during the evening and night of that day. The state then asked permission to reopen its case and show that the store was broken into on the early morning of the 4th. This was not error, the time of day did not become material until the alibi testimony was introduced. It was then competent for the state to show the commission of the offense in the early morning of the day charged, to overcome the evidence of his presence at home during the evening of that day.

One of those jointly charged with appellant was James Ahern, who testified in behalf of appellant, as did appellant, that they had no acquaintance prior to their arrest. The state introduced several witnesses who testified to seeing these two together prior to that time. No error could be predicated on this showing of the state in rebuttal. It could not assume appellant and those jointly charged with him would deny knowledge of each other; when they did, it had a right to meet such testimony.

While appellant was putting in his defense and just before he rested, his counsel made the following request of the court: "I am going to ask Mrs. Mallahan—the mother of this defendant here is confined to her bed; she is unable to come, I am going to ask your honor that the jury may go where she is and take her testimony at home." The state objected, and the objection was sustained. The ruling is assigned as error. The method and manner of conducting the trial is a matter purely within the discretion of the trial court, except in so far as the matter has been determined by statute. A party to an action has no absolute right to have

the trial of the cause or any part of it take place at any place other than the one fixed by law for the trial of causes. Hence, the denial of such a request could not be regarded as error. The only statute we have on this subject is Rem. & Bal. Code, § 344:

“Whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place which shall be shown to them by the judge, or by a person appointed by the court for that purpose.”

If appellant could predicate his request upon this statute, it will be noted that the matter rests wholly within the discretion of the court, and any denial of such a request would not be error.

Appellant had testified that he was confined to his home on October 4 by an injury to one of his knees, and that he wore an elastic bandage. He offered a bandage in evidence as the one he then wore, and it was refused. We cannot understand upon what theory this evidence should have been admitted, or what it would prove, or have a tendency to prove. If it was material that appellant wore a rubber bandage on his knee on October 4, such was already in evidence. No one had attempted to dispute it. It might be proper, under certain circumstances, where wearing apparel is included in the identity or description of a person, to introduce it in evidence; but this was not such a case, and there was no error in its rejection.

Counsel for the state, in making an objection to the visit of the jury to the Mallahan home, said, in part: “I hate to call counsel for grand standing before the jury, but counsel well knows this is improper. . . . It is made for no other purpose than to influence the jury. . . .” Appellant excepted to these remarks, and now says they constitute error. We can see no reversible error in this connection. There

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could be none in any event, because it is proper in such cases to request the court to instruct the jury as to the effect upon them of remarks by counsel, which was not done. Not having taken advantage of his rights below, he cannot assert them here.

Certain instructions are said to be erroneous. No proper exception was taken to the instructions, the only exception being a general one, which, under the long established rule here, is insufficient for a review in the appellate court. In reading the record, however, we have read the instructions, and in order to show appellant was not prejudiced in this respect, we will say we find no error in them. Other errors alleged are insufficiency of the evidence, and the denial of a new trial. These errors have been reviewed in what has been said upon the other points.

The judgment is affirmed.

DUNBAR, C. J., ELLIS, and CROW, JJ., concur.

[No. 9759. Department Two. November 24, 1911.]

T. H. MCMILLEN *et al.*, *Respondents*, v. C. D. HILLMAN,
Appellant.¹

FRAUD—EVIDENCE—SUFFICIENCY. Actionable fraud on the part of the vendee in the sale of a steamboat is sufficiently established, where there was evidence that the vendee induced the vendors to take in part payment an assignment of a fictitious land contract, guaranteeing that \$4,000 of the purchase money had been paid thereon, making representations well calculated to deceive and upon which the vendors relied, inquiry being prevented by the vendee's artifice.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. In the absence of exceptions, error cannot be predicated upon the instructions.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 8, 1911, upon the verdict

¹Reported in 118 Pac. 903.

of a jury rendered in favor of the plaintiffs, in an action for fraud. Affirmed.

Frederick R. Burch (Milo A. Root, of counsel) for appellant.

Douglas, Lane & Douglas, for respondents.

ELLIS, J.—Action for damages for fraud and deceit claimed to have been practiced upon the respondents, plaintiffs below, by the appellant, defendant below, in connection with the sale of a steamboat by respondents to the appellant. The cause was tried to a jury, a verdict was returned for respondents, and from a judgment thereon, this appeal was prosecuted.

We find it necessary, briefly as may be, to review the evidence, which is sharply conflicting in many particulars. In the latter part of July, 1909, the respondents, who had built and were the owners of the steamer "Venus" and had been operating it upon Puget Sound, entered into negotiations with the appellant for the sale of the vessel to him. The selling price agreed upon was \$16,000, which was some \$6,000 less than it had cost to build the boat about two years before. Some talk was had as to respondents taking outside real estate in payment for the boat, but this they refused to do, and never at any time agreed to accept real estate of any kind, either in payment or part payment. They did agree, however, to accept \$5,487 in money, \$1,133 by the transfer of a certain land sale contract of the appellant with one Gagne, and the balance of \$9,380 by the transfer of another land sale contract of appellant with an alleged John P. Martin, whose existence or nonexistence was one of the controverted questions at the trial. It was this Martin contract upon which the charge of fraud was based. It purported to be a contract for the sale by the respondent of certain tracts of land near Pacific City, in King county, aggregating about 16.25 acres, for the sum of \$13,400, on which \$2,020 had been paid at its date, April 21, 1909, and

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\$2,000 on July 21, 1909. The remaining installments, according to this contract, were \$5,000 to fall due January 21, 1910, and \$4,380 on July 21, 1910, with interest at the rate of eight per cent per annum, payable annually. The sale of the boat was consummated on July 30, 1909, the cash payment made, and the two contracts assigned by appellant to respondents.

The appellant, in the assignment, after reciting the above mentioned payments upon the Martin contract, and certain payment upon the Gagne contract, stated, "I further guarantee that said payments above mentioned upon said contracts have in fact been paid." This guaranty was inserted upon the request from respondents for assurance upon that point. The land covered by these contracts was also conveyed to respondents in order, as the evidence shows, to enable them to carry out the contracts and convey the land when fully paid for. The appellant testified that he personally negotiated the sale to Martin at Pacific City, on the date of the contract; that he received at that time the \$2,020 in money, which the man Martin took from his pocket and paid to him in the place of business of one H. B. Cook, and that Cook was then conducting a grocery store in Pacific City, Washington; that the appellant personally received the second \$2,000 on July 21, 1909, also in cash from Martin. Cook testified that, on April 21, 1909, appellant introduced to him a Mr. Martin, in his store at Pacific City; that Martin and the appellant used his desk, and he saw Martin hand to appellant some money; that he, Cook, afterwards had some talk with Martin with a view to selling him wire with which to fence the land. Cook insisted that he was conducting the store at Pacific City in April, 1909. One Earnest Bateman, a cousin of the appellant and in his employ, testified that the appellant introduced to him a Mr. Martin in April, 1909, at Pacific City; that he was present when Martin paid some money to the appellant, and heard the "jingle" of money as it passed hands; that Cook was

then out of business, and that the transaction took place in the store of one Cox. Edward J. Manning, accountant for Hillman Investment Company, testified that the books of that concern showed that the payments on these contracts had been made by check; that he made the entry at Hillman's direction, but that the money never went through the office, either in the form of money or checks.

Appellant explains this by saying that the entry was made merely to keep track of the matter, and that he himself deposited the money in the bank. He testified that he never saw the man Martin, either before or after this transaction, never received any letter from him, made no inquiries regarding him, did not know where he lived at the time, and knew nothing about him at the time of the trial. One O. O. Rowland, a surveyor in the appellant's employ, testified that Hillman, in 1909, introduced to him a Mr. Martin, and that he talked with Martin in regard to the corners of the land included in this contract, pointing them out upon a map.

One Leonard C. Hargiss, who was in the appellant's employ as assistant cashier of the Hillman Investment Company in 1909, testified that, on April 21, 1909, when Hillman claimed to have made the sale to Martin, Hillman was not in the state of Washington, and did not return to this state till in the month of May; and the evidence of the respondent McMillen tends strongly to corroborate this. He testified that he called at Hillman's place of business several times in April, and was told by different employees that Hillman was in California, and that he finally found that Hillman had returned about May 10th. Hillman alone was called to rebut this testimony, and stated that he returned from California on April 9th, 1909. Hargiss further testified that the Martin contract was written up in its entirety in the latter part of July, 1909, by S. B. Smith, cashier of the Hillman Investment Company; that he and Smith signed it as witnesses; that it was a "dummy" contract, made for the sole purpose of turning in on the purchase price of the boat; that he

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never saw the man Martin; that he, on Smith's request, signed as a witness and made the endorsement of the \$2,000 payment on the contract, Smith suggesting that it would look better in his handwriting; and that Smith went into another room with the contract, and returning with it signed with the name John P. Martin, said, "That signature, you know who wrote it. Nobody could tell that, I guess." S. B. Smith, the other witness to the contract, testified that he wrote the contract and signed Hillman's name to it, but owing to the large number of contracts which he had written, he could not remember ever to have seen such a person as John P. Martin. He could not say whether the contract and the endorsements thereon were written at one and the same time, because, he said, "I really don't remember."

The respondents made a slight examination of a part of the land covered by the Martin contract, but the evidence shows conclusively that they knew little of land or land values, and that they were induced to take the contract by appellant's representation that it was a *bona fide* contract, and because of his assurance that Martin had already paid \$4,020 upon the purchase price, they believed he would pay the balance. Respondent J. J. Griggs, when asked why he consented to take the Martin contract, testified:

"Why, because it was represented that there was about one-third, or quite a little portion had already been paid in, and to use their expression, it would be a cinch we would get the balance in the time specified in the contract, and would get part of it within six months and the other part within a year, the balance within a year."

There was much other testimony of this witness, and also of the respondent McMillen to the same effect. The evidence also shows that the respondents made diligent search for Martin and have been unable to get any trace of him or to find any one who ever knew such a man. The evidence as to the value of the land covered by the Martin contract is widely divergent. The appellant testified that in 1909 it

"was not worth quite \$3,000 an acre, but was well worth \$700 an acre, approximately worth what this man is paying for it." Other of appellant's witnesses placed the value all the way from \$1,500 to \$300 an acre, while the respondents' witnesses placed the value at from \$100 to \$150 an acre. The evidence is conclusive that the land is, for the most part, swampy and densely covered with timber and brush, and that it would cost from \$200 to \$250 an acre to clear it.

The issue of fraud and deceit presented by the evidence was submitted by the court to the jury with instructions upon the theory that the respondents had the right to assume that the Martin contract was a valid contract between actual parties, and that the payments had been made thereon as represented; that if, in fact, the contract was fictitious, and if, in fact, it was one of the inducements to the respondents, and they relied upon it as a *bona fide* contract in consummating the trade with appellant, by reason of his representations, then the conduct of the appellant in the premises would constitute fraud, for which the respondents would be entitled to recover in damages the difference between the reasonable value of the land and the balance due on the alleged contract. The instructions covered every phase of the evidence. No exception was taken to the court's ruling upon any point of law nor to any instruction given, hence the instructions are not reviewable here. The instructions made the law of the case, the evidence made the facts. It was the province of the court to declare the law, of the jury to determine the facts.

In any event, the court's view of the law was correct. If the appellant's representations as to this contract were false and made with the intention to deceive, and if, under the circumstances, they were reasonably calculated to deceive, and did deceive, the respondents and induce their acceptance of the contract, they constituted actionable fraud. 14 Am. & Eng. Ency. Law (2d ed.), p. 21.

The only question for our consideration, therefore, is, Was

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the evidence of such a character as to sustain the verdict? It is contended that, under the evidence, there could be no recovery because the respondents had an opportunity to examine the land, and did make some examination of it. The appellant's conduct was well calculated to deceive, both as to the value of the contract and the value of the land. To the ordinary mind, the fact that a man of sufficient substance to do so had so recently paid over \$4,000 upon a purchase price of over \$13,000 for the land, would tend to induce a belief that the balance would be paid. It would also tend to disarm caution and cause a less careful examination of the land, and, to one not versed in land values, imbue the idea that the land was worth the price, or at least sufficient to be ample security for the unpaid balance. The respondents were not buying land, but a contract. Where inquiry is prevented by artifice, the actual success of the artifice should not avail as a defense to a charge of fraud. 14 Am. & Eng. Ency. Law (2d ed.), p. 123; Bigelow, Fraud, p. 524; *Rathbone, Sard & Co. v. Frost*, 9 Wash. 162, 37 Pac. 298.

While it is true, as argued by appellant, that courts will not make contracts for persons *sui juris*, nor relieve against the results of culpable credulity, it is none the less true that courts will insist upon an observance of common honesty by such persons in making contracts for themselves. That credulity is not *per se* culpable which assumes this attribute of common honesty in representations made by one party to a contract concerning matters touching the very existence of the subject-matter within his absolute knowledge and unknown to the other party.

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representa-

tions are made may have an opportunity of ascertaining the truth for himself." 14 Am. & Eng. Ency. Law (2d ed), p. 120.

True, this court has said, in a case where the facts well warranted the language used, and quoted by the appellant:

"Parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business; and they cannot call upon the law to stand *in loco parentis* to them in the ordinary transactions of business and their ordinary dealings with their fellow men." *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366.

See, also, *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613. But this court has also said, where likewise the facts warranted the words:

"Where it is to the court perfectly plain that one party has overreached the other, and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, we do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness. It is well known that many good people, and people of average or greater intelligence, are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts." *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799.

See, also, *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 92 Am. St. 1102; *Bailie v. Parker*, 56 Wash. 353, 105 Pac. 834; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200; *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55; *State v. Knowlton*, 11 Wash. 512, 39 Pac. 966; *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883.

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The foregoing cases make it plain that this court is in accord with the trend of authority in holding that elementary morality should be observed in the making of contracts, even though the complaining party be unsuspecting and fail to exhaust every possible means of detecting the falsity of representations concerning matters peculiarly within the knowledge of the other party. Mere lack of suspicion will not be branded by the courts as a greater fault than deceit.

The following vigorous language is quoted with approval by this court from *Strand v. Griffith*, 97 Fed. 854, in *Woody v. Benton Water Co.*, *supra*:

"There is no rule of law which requires men in their business transactions to act upon the presumption that all men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act upon that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.'"

See, also, *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383; *Schumaker v. Mather*, 133 N. Y. 590, 30 N. E. 755; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551.

In the case before us, the evidence as to the fraud was amply sufficient to sustain the verdict. The appellant complains of the court's instructions as to the measure of damages, but as no exception was taken to the giving of that or any other instruction, the verdict of the jury is conclusive.

The judgment is affirmed.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

[No. 9814. Department Two. November 25, 1911.]

LUIGI CHEICHI, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR—GROUND FOR NEW TRIAL—INSTRUCTIONS CURED. In an action for personal injuries sustained through alleged defects in a work car which jumped the track, it is not such error as to warrant the granting of a new trial to instruct the jury that the plaintiff could not recover if the jumping of the track was the result of a dangerous rate of speed combined with an unsafe condition of the car, without distinguishing between a dangerous rate of speed for a car in good condition and one in bad condition, where in numerous other instructions the jury were told that the plaintiff could not recover even if the car was in an unsafe condition, unless the jumping of the track was the result of such unsafe condition.

MASTER AND SERVANT—NEGLIGENCE—OPERATION OF TRAINS—INSTRUCTIONS. While a trainman operating a defective car at excessive speed so that it jumped the track cannot recover if the jumping of the track was the result of such unsafe condition combined with the dangerous rate of speed, yet an instruction that, if the jumping of the track was the result of a dangerous rate of speed, the plaintiff could not recover, would naturally be understood by the jury as having reference to the particular car, and it would be unnecessary to draw a distinction between the rate of speed for a car in good condition and one that was in an unsafe condition.

Appeal from an order of the superior court for King county, Ronald, J., entered June 16, 1911, granting a new trial, after the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by a section hand through the derailment of a car. Reversed.

C. H. Winders, for appellant.

Frank E. Green, for respondent.

DUNBAR, C. J.—This action was brought to recover damages on account of personal injuries sustained by the respondent while in the employ of appellant as a track and sec-

¹Reported in 118 Pac. 916.

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tion hand. It is alleged in the complaint that, on the day of the accident, the plaintiff was ordered to go aboard and ride upon one of the defendant's cars; that while on such car, in obedience to the direction of the appellant, the car jumped and leaped from the rails, causing the injury complained of. This car in question had been a track car, and had been reconstructed into a push car. The plaintiff and thirty-four of his fellow workmen had been ordered to get the car and move some rails, and while the car was in operation and under the control of the plaintiff and his fellow workmen, it jumped the track, and the accident happened.

The charge in the complaint is that the defendant wrongfully and carelessly failed and neglected to perform its duty, in that it had suffered said car to become greatly worn and out of repair in many particulars mentioned, and that it had carelessly employed and furnished incompetent, careless, and negligent operators to control said car. But no attempt was made at the trial to establish the allegations in relation to incompetent and inexperienced operators, and it conclusively appeared that the operation of the car was under the control of the fellow workmen of the respondent. The case was submitted to the jury, and verdict was rendered in favor of the defendant, the appellant here. Upon motion for a new trial, the court came to the conclusion that it had erred in a certain instruction given to the jury, and for that reason, the motion for new trial was granted; and from the granting of such motion, this appeal is taken.

The particular instruction upon which the court granted the motion for a new trial was as follows:

"If you are unable to determine by a preponderance of the evidence whether the car was in an unsafe condition or not, or even if it was, whether that was the cause of the jumping the track—if the jumping of the track was the result of a dangerous rate of speed, combined with an unsafe condition of the car, and if it would not have jumped except for the speed, then plaintiff has not satisfied you by

a preponderance of the testimony of the facts necessary to entitle him to recovery."

The court, upon a re-examination of this instruction, concluded that it was misleading, for the reason that it did not distinguish in the instruction between what might be a dangerous rate of speed for a car in good condition and a dangerous rate of speed for a car not in good condition, if the jury should find that this car was not in good condition. We think the learned judge criticized his instruction too technically, and that the jury was in no way misled. The court in this instruction said no more to the jury than it had said in a preceding instruction; viz., in effect, that the injury must be the result solely of such defective car. It is true that, if the jumping of the track was the result of a dangerous rate of speed combined with an unsafe condition of the car, the plaintiff should not be allowed to recover; for, under the conceded facts of the case, the unsafe condition of the car would not have been the sole cause of the accident if it had been combined with a dangerous rate of speed. As to the distinction in rate of speed between a car in good condition and one which was not in good condition, the jury would naturally understand that the dangerous rate of speed spoken of by the court was with reference to the particular car under consideration, the condition of which was an issue in the case. In any event, the whole instruction on this question shows that the jury could not possibly have been misled. The court had previously told the jury:

"Unless you are satisfied by this preponderance of the testimony that this car was not reasonably safe, then you cannot find for the plaintiff; and even though you should be satisfied that the car was not in a reasonably safe condition for its use in the business for which it was being applied, that still would not be enough, for you must be further satisfied by a preponderance of the evidence that the jumping of the track was the result of this unsafe condition."

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In another place it was said by the court:

"Unless plaintiff satisfied you that it was in an unsafe condition, and that that was the cause of its jumping the track, your verdict must be for the defendant."

In many places in the instruction the law was expressly stated to the jury, in language so terse and clear that their duty was plainly presented to them; and under such instructions, it is unreasonable to conclude that the instruction upon which the new trial was granted, conceding that it was cloudy and indefinite, would erase from the mind of the jury or in any way affect their understanding of the issues plainly presented by the whole instruction. It is the settled rule of this court that, although detached statements or expressions of the court in its charge to the jury may be technically erroneous, yet if the instructions as a whole fairly state the law, there is no prejudicial error. It was said by this court in the syllabus to *Seattle Gas & Elec. L. & M. Co. v. Seattle*, 6 Wash. 101, 32 Pac. 1058:

"Although detached expressions in the court's charge to a jury, if considered as independent expressions, may be technically erroneous, yet if the instructions as a whole, and considered together, fairly state the law, in nowise misleading the jury, there is no prejudicial error."

And in *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111:

"The whole instruction must be construed together. So construed, it was not error. It is true that this sentence is not technically correct; . . . This court has frequently held that where an isolated portion of an instruction, standing alone, may be technically erroneous, yet if the whole instruction, taken together, fairly states the law, it will be upheld."

In *Wolf v. Hemrich Bros. Brewing Co.*, 28 Wash. 187, 68 Pac. 440, it was said:

"Prior to using this language, the court distinctly and clearly defined to the jury the issues involved, and further

on instructed them, not only that the respondents must sustain their case by a fair preponderance of the evidence, but that the jury were the sole and exclusive judges of the facts. Conceding, therefore, this particular part of the instruction, standing alone, to be of doubtful meaning, which is certainly all that can be successfully claimed, the jury could not, in the light of the whole instruction, have understood that the court meant thereby to tell them that it was established by a preponderance of the evidence that the harness was totally destroyed."

What is said in this case applies with especial directness to the case at bar. The same doctrine was announced in *Neal v. Phoenix Lumber Co.*, 64 Wash. 523, 117 Pac. 267, in *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355, and in a long line of unbroken authority.

This case falling within the rule announced in those cases, the judgment will be reversed.

CROW, MORRIS, and ELLIS, JJ., concur.

[No. 9718. Department Two. November 25, 1911.]

JOSEPH BRINTON, *Appellant*, v. LEWIS-LITTLEFIELD
COMPANY *et al.*, *Respondents*.¹

TRUSTS—DECLARATION OF TRUST—CONSTRUCTION—POWERS OF TRUSTEE. A declaration of trust to hold, manage or sell lands purchased for speculation, and subject to a mortgage, at such time and price and on such terms as shall to the trustee seem best for the interests of the subscribers, authorizes the trustee to deed the same to the mortgagee to save the costs of foreclosure, and preserving the equity of redemption for two years by an option to repurchase, where it became impossible to effect a sale or obtain from the subscribers the balance of the purchase price or pay off the mortgage, and the interests of the subscribers were best protected by such course.

TRUSTS—ACTION TO DECLARE TRUST—RIGHTS OF PLAINTIFF—EQUITY. A mortgagee to whom a trustee had deeded the property, cannot be declared a trustee of the interest of a subscriber to the fund to purchase the property, where the subscriber refused to pay

¹Reported in 118 Pac. 917.

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his part of the balance of the purchase price secured by the mortgage, or to reimburse the mortgagee for taxes and expenses incurred; since he who seeks equity must first do equity.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 3, 1911, in favor of the defendants, after a hearing before the court, dismissing an action for equitable relief. Affirmed.

E. W. Howell, for appellant.

Leander T. Turner and *Sandford C. Rose*, for respondents.

MORRIS, J.—It is sought in this action to follow trust funds into the hands of a third party, and to obtain a decree holding such third party to be a trustee for the benefit of plaintiff. The court below dismissed the cause, and this appeal follows.

The facts are these: The Lewis-Littlefield Company was, at the time of the involved transaction, engaged in the real estate business at Seattle. On February 13, 1907, the company received from appellant \$650 to invest in real estate for the use and benefit of appellant, and gave him its acknowledgment as follows:

“Received of Joseph Brinton \$650 for investment in real estate. It is understood that the money is to be invested as soon as possible, and that as soon as so invested, a complete statement and declaration of trust is to be furnished. It is also understood that as soon as the property is sold, the whole or any part of this money, together with the profits, may be withdrawn by the subscribers.

“Lewis-Littlefield Co.,

“By Geo. B. Littlefield, Manager.”

On February 16, Lewis-Littlefield Company purchased from respondents Black, lot 7, block 9, Rainier Boulevard Fourth addition to Seattle, for the sum of \$4,000, taking the title in its own name. Of this amount \$1,350 was paid in cash, and the balance was represented by a promissory note payable in one and two years and secured by a mortgage on

the lot. On February 27, Lewis-Littlefield Company, in pursuance of its agreement expressed in its receipt of February 13, executed and delivered to appellant the following declaration of trust:

"This is to certify that Lewis-Littlefield Co., a corporation of Seattle, Washington (hereinafter called the company), has received from Joseph Brinton of Seattle, (hereinafter called the subscriber), for investment in property for sale by said company as brokers or owners, the sum of six hundred and fifty and no-100 dollars (\$650), and that the same has been expended, together with other similar sums, in the purchase of lot 7, block 9, Rainier Boulevard Fourth addition to the city of Seattle, at the price of four thousand dollars (\$4,000) and upon the following terms: One thousand three hundred and fifty and no-100 dollars (\$1,350) cash, balance, one and two years at 7 per cent per annum. There has been subscribed for the purchase of this property the sum of one thousand three hundred and fifty and no-100 dollars (\$1,350), which has been or is to be expended as follows: Cash payment, .. \$1,350. Property to be sold before one year. This property is held by the company in trust for the subscriber and for other subscribers to the fund, upon the following terms: The property is to be held and managed by the company for the benefit of the subscribers, the said company retaining the exclusive right to sell such property at such time, at such price and on such terms as to said company shall seem best for the interest of the subscribers. If, at any time, it shall seem necessary to make any further payments for the protection of the interests of the subscribers, the company shall have the right at their option to make such payments, and to receive repayment of same with interest at the rate of eight per cent per annum, from the first proceeds of the sale of the property. When the property is sold, the proceeds shall be applied as follows: 1st, To the payment of the expenses of the sale, including a commission of 5 per cent to Lewis-Littlefield Co.; and, 2nd, to the repayment of such sum or sums, in excess of the original subscriptions as may have been applied to the payment of taxes, special assessments or other expenses necessarily incurred in protecting the interest of the subscribers, with interest at the rate of eight per cent per annum from the date of such payment or payments to the date of the sale

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of the property. 3d. The surplus remaining after payment of the foregoing sums shall be distributed *pro rata* to the subscribers, the amount due the holder of this certificate being 650-1350 of the entire net proceeds.

"In witness whereof the company has caused this certificate to be signed and its corporate seal to be affixed by its manager, thereunto authorized, this 21st day of February, 1907.

Lewis-Littlefield Co.,

"(Corporate Seal.) By Geo. B. Littlefield, Manager."

The cash payment of \$1,350 is conceded to be made of the \$650 paid in by appellant and \$700 paid in by other parties, under the same arrangement. On March 28, 1908, appellant paid to Lewis-Littlefield Company the further sum of \$65, which, with other sums paid in by other subscribers, was used in making a partial payment of interest then due on the note and mortgage. At the time of the purchase of the lot from Black, the real estate market was active, especially in the neighborhood of this lot, where, on account of certain regrades of streets connecting with the down-town portion of the city, it was assumed property in this vicinity would be brought into closer touch with the business district of the city and its value greatly increased. It is apparent that this was in the minds of the subscribers to this trust fund at the time, and that they expected to make a resale of the lot before any additional payments were required, at such an increase over its cost as to give them a handsome profit on their investment. Unfortunately, like other "best laid plans," this expectation was never realized. The year 1907 saw many business reverses. Times became hard, money scarce, and investments of every nature, made on the expectation of "quick sales and ready profits," returned only disappointment and withered hopes. This is shown to be especially true of real estate values in the vicinity of this lot. Lewis-Littlefield Company made strenuous efforts to sell, but was unable to do so. Street assessments, taxes, interest, and the first payment on the note became due, and these investors found themselves with an unsalable lot on

their hands, and were either unable or unwilling to make further advances to protect their interest in the property. The record shows that Lewis-Littlefield Company kept appellant fully informed of the situation, but with the exception of the \$65 paid by him for the purpose of meeting the first interest payment, he was not in a financial situation to respond to the demands made upon him for his share of the required payments. This was the situation when the note and mortgage became due and payment was demanded by Black.

After some deliberation between Lewis-Littlefield Company and Black as to the best way to protect all the interests in the lot, it was decided, in order to save the cost of a foreclosure of the mortgage, to give Black a deed to the lot. This was done on August 6, 1908, six months after the mortgage by its terms could have been foreclosed, and after Black, in order to protect his mortgage, had paid a street assessment of \$225, taxes for 1907, and the first half of the 1908 taxes. This deed to Black was made under an arrangement that, if the balance of the interest on the principal sum should be paid on or before August 20, 1908, the deed should be returned and the mortgage extended to mature February 16, 1910. Lewis-Littlefield Company endeavored to raise the necessary amount from the subscribers to meet these interest payments, but was unable to do so, and it was then agreed that Black would give the company an option to purchase the property for \$2,650, in addition to the amount paid for taxes and accrued interest, the option to expire September 1, 1909. After obtaining this option, Lewis-Littlefield Company continued its efforts, both to obtain a sale of the lot and to collect from the subscribers sufficient money to take up the option. Neither effort was successful. By arrangement between Lewis-Littlefield Company and Black, this option, which by its terms expired September 1, 1909, was extended until some time in August, 1910,

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thus giving the members of the purchasing syndicate nearly two years in which to redeem the property.

We have gone thus fully into the facts shown by the record in order to show the situation developed by the evidence under which appellant claims he is entitled to equitable relief. His first contention is that, under its trust declaration, the Lewis-Littlefield Company had no power to convey the property to Black, in order to avoid a foreclosure of the mortgage, and that the sale authorized in the declaration of trust was only such a sale as was contemplated by the parties at the time the trust agreement was entered into; that is, a sale to some third party for a consideration to be paid for the benefit of the members of the syndicate. Equity has regard for the substance rather than the form. The authority to sell conferred upon the Lewis-Littlefield Company was one that should be made to secure the best interests of the subscribers to the trust fund. It is doubtless true that, at the time the declaration was made, all parties contemplated a sale for profit, without additional expense. The exigencies of the time made this impossible. What they contemplated failed, and a new condition confronted them, in which Lewis-Littlefield Company must act so as to conserve and preserve the best interests of the trust. In this unforeseen emergency, Lewis-Littlefield Company acted as to it seemed best for the interest of its subscribers. It saved the costs of a foreclosure of the mortgage, while at the same time preserving the right of the subscribers to obtain the property and protect their initial payments for a period of nearly two years after they had lost their interest in the property through their default.

Appellant must concede the right of Black to foreclose the mortgage. What would it benefit appellant, and those in a like situation, if he had done so? To the amounts due under the mortgage, would have been added the cost of the foreclosure, including attorney's fees and the added charges upon the land by way of taxes and assessments. Conceding the statutory redemption from the sale under the foreclosure

decree, appellant and his associates would have had a greater sum to pay within one year than the amount fixed by Black, and for which payment they were given nearly two years. In construing that clause in the declaration, a court of equity will not limit itself to what appellant considered to be for his best interest in the sale of the property, but will look to all the circumstances surrounding the sale at the time it was made, to determine what would, in the language of the declaration, amount to a sale of the property "at such time, at such price, and on such terms as shall seem best for the interest of the subscribers." It seems to us there is but one answer to such a question, and that, the arrangement which gave these subscribers the greater time for the less price. The case is not unlike that of *Sprague v. Betz*, 44 Wash. 650, 87 Pac. 916, where it was held that trustees under a will, with power to sell but not to mortgage, having given a mortgage upon the trust estate, could subsequently convey the property to the mortgagee, notwithstanding the invalidity of the mortgage, under an agreement for the satisfaction of the debt, with right of redemption reserved to the beneficiaries within three years.

Appellant's main reliance is upon a rule laid down in *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540, that a power vested in the executrix of a will to sell real estate "as she may deem most expedient and for the best interest of all of my said legatees," is not well executed by the conveyance to one of the legatees of a portion of the real estate of the testator in payment of a debt due from the testator to the legatee. The reasoning of the court makes that case of no value to appellant. It is based upon the lack of power or control in the executrix over the real estate. There was personal property enough for the payment of the testator's debts without calling upon the real estate, and the real estate was not liable for the payment of debts until the personal had been exhausted, and that inasmuch as the discharge of the testator's obligation was a duty resting upon the

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executrix, and she had ample funds with which to discharge it, she could not avoid the duty as executrix and seek to meet the obligation under the general power of trust in which the payment of debts was no part of the trustee's duty. Besides, the court is there dealing with a power which must be legally exercised, under its strict terms. Here we are dealing with a power to be equitably exercised, and to be interpreted by reference to well known principles of equity.

Neither do we think the record shows that, while seeking equity, appellant was willing to do equity. He sought in his complaint to be adjudged the owner of an undivided 715-4000 interest in the land, upon the theory that the price of the land to the syndicate was \$4,000, and that he had paid in altogether \$715. Subsequent to the sale to the syndicate, an indebtedness had accumulated against the land in taxes, local assessments, and interest due on the note and mortgage, which had increased the amount due Black from \$2,650, the amount of the deferred payments at the time of the purchase by the syndicate, to approximately \$3,500. These taxes and local assessments had been paid by Black. Yet appellant prays for an interest in the land which charges these items of interest, taxes, and local assessments against the interest which Black would retain. There is no equity in such a prayer, and no court of equity would grant it. Black, on the other hand, while asserting an absolute ownership in the lot under the deed from Lewis-Littlefield Company, made an offer in his answer to convey the property, if within thirty days the appellant would pay the amount due on the original purchase, together with these additional charges against the land, which would make the price of the land under this offer approximately \$3,500. This was an offer to do equity, as we view it, which appellant was not willing to accept. Appellant, upon the trial, offered testimony that the value of the land was at that time, as fixed by one of his witnesses, \$4,000. Another gave it as \$4,500. If appellant believed this was the true value of the land, and we as-

sume he did since he sought to prove it, an acceptance of Black's offer to convey at a price which would make him whole on the transaction, which was \$3,190.26, plus interest and taxes since paid, and which was approximated at the time of the trial at \$3,500, was all that appellant could ask a court of equity to do and have any regard for other equitable interests in the property.

Upon the whole case, we can see no equity in appellant's prayer, and the judgment is affirmed.

DUNBAR, C. J., ELLIS, and CROW, JJ., concur.

[No. 9749½. Department One. November 25, 1911.]

JOHN ROMMEN, *Respondent*, v. EMPIRE FURNITURE
MANUFACTURING COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—OPERATION OF SAW—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The operator of a rip saw is not guilty of contributory negligence, as a matter of law, in attempting to remove a board after a pinch had stopped the saw, without first turning off the power at a switch eight feet away, or without calling some one to his assistance, where it appears that there was great danger in leaving the board in the saw to reach the switch, and where he firmly held the board and it would not be anticipated that the board firmly held would rebound upon the friction being removed in the manner that it did.

MASTER AND SERVANT—GUARDING DANGEROUS MACHINERY—QUESTION FOR JURY. Upon a conflict of the evidence, it is for the jury to determine whether a combination rip saw could be effectively guarded under the factory act.

WITNESSES—CROSS-EXAMINATION—DISCRETION—APPEAL—EXCEPTIONS. Error cannot be predicated upon allowing cross-examination of a party's own witness who was clearly hostile, nor where no exception was taken, the same being within the discretion of the trial court.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—MASTER AND SERVANT—FACTORY ACT—EVIDENCE. It is not prejudicial error to refuse to give an instruction as to the *prima facie* effect of a certifi-

¹Reported in 118 Pac. 924.

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cate of the state labor commissioner on the inspection of machinery to be guarded, under the factory act, to which the party was entitled, where by other instructions an equal burden was put on the party, the jury being told that the burden was upon the plaintiff to establish one or more of his allegations of negligence, that negligence was never presumed, and must be proven by the fair preponderance of the evidence, and the court read the first section of the factory act and otherwise fully covered the law of the case.

DAMAGES—PERSONAL INJURIES — EXCESSIVE VERDICT — INJURY TO HAND. A verdict for \$1,500 for the loss of a little finger, disfigurement and stiffening of the right hand, by the operator of a rip saw, thirty-two years of age, is not so excessive as to indicate passion or prejudice.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 25, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the operator of a rip saw. Affirmed.

Henry S. Noon and James E. Bradford, for appellant.

J. P. Wall and Milo A. Root, for respondent.

GOSE, J.—This is a suit to recover damages for personal injuries. A judgment for the plaintiff is challenged by this appeal. The suit is brought under the factory act. The charges of negligence are two in number: (1) the failure of the appellant to install a belt shifter, and (2) its failure to guard its saw. The facts are these: The respondent, a cabinet maker by trade, had his right hand injured and the small finger cut off while operating a rip saw upon a combination machine used for general cabinet work. There was no belt shifter or other device for shutting off the electric power, other than a switch some six or eight feet from the saw. The saw was not guarded. The saws, three in number, were susceptible of adjustment to an angle of forty-five degrees. They were used interchangeably for cross-cutting, ripping, beveling, and grooving. The table of the machine was about three feet square, and stationary. The saws re-

volved in a groove in the table. They varied in size from six to eight inches in diameter, and extended three or four inches above the surface of the table.

At the time the respondent received the injury, he was ripping an oak board, six or seven feet in length, six inches in width, and three-fourths of an inch in thickness. The board was placed against the saw, and after it had been ripped some eight or ten inches, there was a pinch or squeeze which stopped the saw. The respondent then detached the board and placed the other end against the saw. When the board had been ripped about four or five feet, there was a second pinch which stopped the saw. The respondent then tried to loosen the board and start the saw, but was unable to do so. He then took a wedge, six or seven inches in length, which he had prepared for the purpose, reached over the saw with his right hand, and inserted it in the opening in the board about ten inches beyond the saw, for the purpose of releasing the pressure and starting the saw. When the pressure was released, the board was thrown backward, and the respondent's hand came in contact with the saw, causing the injury. When he reached over the saw to insert the wedge in the board, he had his left hand upon the end of the board next to him, and his body against the board and the table of the machine. He testified that he was holding the board tightly, and did not expect it to be thrown backward, although he knew it had that tendency when the friction was taken off. Two of the appellant's witnesses testified that they would not have anticipated that a board would rebound upon the friction being removed, if the operator was firmly pressing it with his body. Eight other cabinet workers were at work on the same floor with the respondent, and each used the machine whenever his work required it.

Upon these facts, appellant contends that the respondent was guilty of contributory negligence which bars a recovery. The argument is that the switch, some six or eight

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feet from the machine, afforded a safe way of doing the work; and that, when the saw pinched and could not be started, it was the plain duty of the respondent to step to the switch, throw off the power, and then release the pressure. It is said that he chose the unsafe way, and that, in reaching over the saw, he was guilty of negligence.

In reference to the switch affording a safe way, there is evidence to the effect that it would have been dangerous to leave the board with the power on and stop the switch; and that, if the saw should have started with no one holding the board, the board would have been thrown with great force. There is further evidence that a man was killed in that manner in another mill. This clearly presented a question for the jury under a proper instruction, which the court gave. Nor can it be ruled, as a matter of law, that the respondent was guilty of negligence in reaching over the saw and inserting the wedge in the board. He was holding the board tightly with the other hand, and had the weight of his body against it and the table containing the saw. The saw was a small one, and extended only three or four inches above the surface of the table. The following cases are in point: *Bush v. Independent Mill Co.*, 54 Wash. 212, 103 Pac. 45; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *McKean v. Chappell*, 56 Wash. 690, 106 Pac. 184; *Berger v. Metropolitan Press Printing Co.*, 61 Wash. 35, 111 Pac. 872.

In the *Bush* case, it was held that the contributory negligence of the deceased was a question for the jury, where the deceased lost his life in stepping over a revolving shaft containing a projecting set screw, where the shaft and set screw extended sixteen or eighteen inches above the floor and its presence was known to the deceased. The court said that, "whilst injury might result therefrom, the act was not necessarily a negligent one."

The appellant puts much stress upon *Laidley v. Musser Lumber & Mfg. Co.*, 45 Wash. 239, 88 Pac. 124. A read-

ing of that case will disclose that the facts are somewhat dissimilar. The court said in that case, speaking of the conduct of the plaintiff, that the act which caused the injury was one which "would naturally and almost necessarily precipitate his arm against the saw." No such statement could be made upon the facts in the instant case. Other cases are cited by the appellant which announce the rule that, where there are two ways of doing an act, the one fraught with danger and the other safe, there can be no recovery where the unsafe way is voluntarily pursued. Such cases are not controlling here. As was said in *Beltz v. American Mill Co.*, 37 Wash. 399, 79 Pac. 981:

"Every case in which negligence or contributory negligence is charged depends so largely upon its own particular circumstances that the decisions in other cases are only important in so far as they lay down or establish general rules or principles."

It is further suggested that it was the duty of the respondent to call to his assistance one of his fellow workmen, and that his failure to do so was negligence. This was also a question for the jury.

It is next contended that the factory act does not apply to a combination machine; that the saw could not have been effectively guarded with "due regard to the ordinary use of such machinery." There is abundant evidence that a belt shifter could have been placed underneath the table so that the operator of the saw, by placing his foot upon it, could have thrown off the belt and stopped the saw, and there is testimony that the saw itself could have been guarded. It is only fair to say that there is testimony to the effect that, owing to the varied uses of the saws, they could not have been effectively guarded. Upon this conflict in the evidence, the question was for the jury. *Barclay v. Puget Sound Lumber Co.*, 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140.

Counsel for the respondent was permitted to cross-ex-

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amine his own witness, and this is assigned as error. It suffices to say, (1) that the witness was clearly hostile to the respondent; (2) that no exception was taken to the ruling of the court; and (3) that such course was within the sound discretion of the court.

Numerous errors are assigned to the instructions given, and to the refusal of the court to give certain requested instructions. The requested instructions, with one exception, were given in substance. This instruction we will now consider. The respondent was injured October 31, 1910. On October 15 preceding, the state labor commissioner examined the appellant's machinery, and gave it a certificate to the effect that the machinery conformed, in the judgment of the commissioner, to the requirements of the factory act. The certificate was put in evidence, and the evidence tends to show that there had been no change in the machinery between the date of the inspection and the date the respondent was injured. The statute, Rem. & Bal. Code, § 6593, provides that the certificate shall be "*prima facie* evidence as long as it continues in force" of compliance on the part of the holder with the provisions of the act. The certificate was issued for a year, and was in force when the injury was sustained. The appellant submitted a written instruction covering the statutory effect of the certificate. The court said to the jury, in reference to the certificate, in substance, that it had been put in evidence, and that they would take it to the jury room. No other instruction is given on the subject.

Clearly, the court should have given the requested instruction. However, we think it was error without prejudice. The court instructed the jury that the burden was upon the respondent to establish "one or more" of the allegations of negligence alleged in the complaint, by "a fair preponderance" of the evidence; that negligence is never presumed, but that it must be proven by the party asserting it "by a fair preponderance of the evidence." Had the

instruction been given, it would have put no other or heavier burden on the respondent. The court read to the jury the first section of the factory act, and otherwise fully and fairly covered the law of the case. In *Chicago, M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515, we said:

"We have repeatedly held that a case will not be reversed for error that, upon the entire record, does not appear to be prejudicial."

Finally, it is said that the damages awarded are excessive. The respondent was thirty-two years of age, a cabinet maker by trade, and earning \$3.50 per day when he was injured. He sustained his injury October 31, resumed work for the appellant at the same wage on December 12 following, and continued to work for it, with the exception of a lay-off of two weeks, until about March 1, 1911. With reference to his injury, the respondent testified that it "is awful painful yet, if I happen to hit it right here (showing), or bump it against anything;" that he was hurt "right in the wrist, and it went out and cut off the little finger of the right hand; split the hand open all the way, as you can see for yourselves;" and that:

"It does interfere quite a little bit because I can't close my hand in the manner I done before, because I can't close it any more than this (showing). The other hand I can close as close as I am a mind to, but I can't close them fingers in here at all (showing). If I do, it kind of stretches out in here (showing). I don't know what it is. It will be the same with this hand if I hang on to the little finger. I can't bend it (showing)."

The verdict and judgment were for \$1,500. The appellant, among other cases, relies upon *Olsen v. Tacoma Smelting Co.*, 50 Wash. 128, 96 Pac. 1036. In that case the injury consisted in the loss of a little finger, and the injured party was confined to the hospital about two hours and was disabled for a time. There was a verdict and judgment for \$1,500, which this court reduced to \$1,000. In the case at

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bar, the respondent, in addition to the loss of a little finger, suffered a disfigurement and stiffening of the hand, to what extent we cannot tell, as is shown by the excerpted testimony. The trial judge and the jury saw the hand, and were in a much better position to know the extent of the injury than is this court from reading the record. The damages awarded appear to be liberal, but we do not feel inclined to hold that they are so excessive as to indicate that the jury were influenced by passion or prejudice. Indeed, the very nature of the injury is such as to negative such a conclusion. *Keane v. Seattle*, 55 Wash. 622, 104 Pac. 819.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ.,
concur.

[No. 9805. Department One. November 25, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. AXEL NIST,
Appellant.¹

CRIMINAL LAW—EVIDENCE—DYING DECLARATIONS—DECLARATION OF CO-CONSPIRATORS. Upon a prosecution for the murder of a policeman, shot while attempting to arrest the accused and his companion or co-conspirator, who was also killed in the melee, the dying declaration of the co-conspirator is not admissible in evidence, where the declaration was a mere narrative of past events; since it was not made during the existence or in furtherance of the conspiracy, and was hearsay.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—CURING ERROR—OTHER EVIDENCE. The erroneous admission of evidence which might have affected the verdict will not be held harmless because the conviction was sustained by other evidence, unless it is clearly shown that it was nonprejudicial.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 6, 1911, upon a trial and conviction of murder in the second degree. Reversed.

¹Reported in 118 Pac. 920.

Ivan Blair, for appellant.

John F. Murphy, Alfred H. Lundin, and H. B. Butler, for respondent.

FULLERTON, J.—The appellant, Axel Nist, and one John Ford were jointly charged with murder in the first degree, by an information reading as follows:

“I, John F. Murphy, prosecuting attorney in and for the county of King, state of Washington, come now here in the name of and by the authority of the state of Washington, and by this information do accuse Axel Nist and John Ford, alias Ryan, alias Loffey, and each of them, of the crime of murder in the first degree, committed as follows, to wit:

“They, said Axel Nist and John Ford, alias Ryan, alias Loffey, and each of them, in the county of King, state of Washington, on the 23d day of February, 1911, did wilfully, unlawfully, feloniously, and with a premeditated design to effect the death of one Judson P. Davis, shoot at, towards and into the body of said Judson P. Davis, with certain deadly weapons, to wit, revolver-pistols, then and there loaded with powder and bullet, and then and there held by them, the said Axel Nist and John Ford, alias Ryan, alias Loffey, and each of them, thereby mortally wounding said Judson P. Davis, of which said mortal wound said Judson P. Davis then and there died.

“Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington.”

The information was filed on March 21, 1911. At that time Ford was dead, he having died some two days subsequent to the shooting mentioned in the information. Nist was subsequently tried for the offense charged against him, and convicted of murder in the second degree. He appeals from the judgment and sentence pronounced upon him.

On the trial the state introduced evidence tending to show that Judson P. Davis, at the time he was killed, was a police officer of the city of Seattle; that he, together with another officer, one Hugh C. Smith, was doing patrol duty in an outlying district in the city of Seattle; that they were dressed

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in civilian clothing, and wore no visible badges by which they could be distinguished from the ordinary citizen; that in the early part of the evening of February 23, 1911, they ran across the appellant and Ford, and, becoming suspicious because of their appearance and actions, followed them for some distance, finally approaching them; that the appellant and Ford thereupon left the sidewalk and turned into the street, whereupon the officers called upon them to halt; that instead of obeying the command, Nist and Ford turned quickly with drawn revolvers and told the officers to throw up their hands, and at once began firing at them; that the officers returned the fire, and in the melee which followed, Davis was killed outright, Ford was mortally wounded and died therefrom two days later, and Nist was wounded in the hip. The state thereupon called one J. E. Boyden, who testified to the effect that, on the day following the shooting, he visited Ford at the hospital in the city jail, for the purpose of procuring Ford's version of the shooting as a story for the newspaper for which he was then acting as a reporter, and that Ford gave him an account of the affair, as well as an account of his acquaintance with the appellant and of their doings for some days prior to their affray with the police officers; testifying further that Ford, at that time, was in the immediate danger of death and fully realized his condition. He was thereupon permitted to state, over the objection of the appellant, what Ford had said to him; stating, among other things, that Ford said that the appellant and he began the shooting, firing upon the officers before the officers began firing at them; and that they had been engaged in a certain case of highway robbery that had taken place in the city of Seattle some few days prior to the shooting

At the conclusion of the evidence, the court instructed the jury in part as follows:

"Respecting the alleged confession or statements made by the said John Ford after the shooting, and while in the

hospital, to newspaper men and the police officer, you are instructed that such statements in and of themselves do not prove a conspiracy. You must believe from other evidence in the case, either direct or circumstantial, or both, that a conspiracy had been formed before you could find a conspiracy established by the statements of the said John Ford after the shooting, and at most the statements, if any, of John Ford, would be corroborative thereof."

Later on he recalled the jury, and after repeating the foregoing instruction, modified it in the following manner:

"On reflection, I withdraw this instruction from your consideration, and instruct you now to not consider the same as the law in this respect. Instead of that instruction, I declare the law to be as follows: Respecting the alleged confessions or statements made by the said John Ford after the shooting, and while in the hospital, to newspaper men and police officers, you are instructed, that such statements in and of themselves, standing alone, do not prove a conspiracy, and that unless you find from other evidence, direct or circumstantial, in the case, corroborative of such statements that a conspiracy to commit crime existed between the defendant and the said John Ford, you are to disregard such statements. But if you do find from the evidence that the statements of the said John Ford did relate to the defendant, and that the same showed, or tends to show, a concerted design to commit crime on the night in question, and while out for that purpose—that this shooting occurred wherein Davis lost his life—that said Ford or the defendant were the aggressors, and that the same is corroborated by other direct or circumstantial evidence in the case, then his statements are evidence that you may consider with other evidence in the case."

The appellant assigns error upon the admission in evidence of the testimony of the witness Boyden as to the statements made to him by Ford, and the giving of the instructions above quoted.

The ground upon which the court admitted testimony as to the statements of Ford does not appear very clearly in the record. From the preliminary proofs it would seem that it was thought to be admissible as a dying declaration. But

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it is manifest that the evidence was not admissible on this ground. Dying declarations are but a species of secondary or hearsay evidence, and their admission is an exception to the rule that excludes hearsay evidence. The exception is founded on the necessities of the case. It oftens happens that there is no third person present to be an eyewitness to an act which results in the death, and if the dying statements of the victim were rejected, there would often be no legal evidence of the facts constituting the crime, and the murderer would go unpunished. But since the rule is founded on the necessities of the case, it is not allowed to extend beyond such necessities; and, hence, a dying declaration, to be admissible as evidence, must be one made by a declarant whose death is the subject of the inquiry. Dying declarations of third persons who were mere participants in, or witnesses to, a transaction causing the death of another are not admissible as evidence on the trial of a person for causing the death of that other. *Snow v. State*, 58 Ala. 372; *West v. State*, 76 Ala. 98; *Daily v. New York & New Haven R. R. Co.*, 32 Conn. 356, 87 Am. Dec. 176; *State v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *Mora v. People*, 19 Colo. 255, 35 Pac. 179; 1 Phillipps, Evidence, 287; 1 Greenleaf, Evidence, 156.

It has been held, also, that where two persons were killed by the same act, the dying declaration of one of the victims cannot be received in evidence on the trial of a person indicted for the murder of the other. *State v. Westfall*, 49 Iowa 328; *State v. Bohan*, 15 Kan. 407. In the case before us, the subject of the inquiry was not the death of Ford, and his dying declarations, merely as such, are not proper evidence on the trial of the appellant for the murder of Davis.

The instructions of the court above quoted would seem to indicate that it admitted the statements on the theory that the appellant and Ford conspired together to commit crime, and that the declarations of one co-conspirator are admissible to prove the guilt of the others. But this rule is inapplica-

ble to the case in hand. The acts and declarations of one co-conspirator are admissible on the trial of the other, when the act is shown to have occurred, or the declaration is shown to have been made, during the existence of the conspiracy and in the furtherance of it. Declarations made after the conspiracy has ceased to exist, and which are thus but narratives of past events, are admissible only against those from whom they proceed; they are not receivable as evidence against a fellow conspirator. *State v. Mann*, 39 Wash. 144, 81 Pac. 561; *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156.

It is plain that what Ford told the witness Boyden was in no sense something said or done in pursuance of a conspiracy. It was but a narrative of past events, and is clearly without the rule that renders the declaration of a co-conspirator admissible as evidence.

In the briefs it is suggested that the statements were admissible under the doctrine of the case of *State v. Mann*, *supra*. In that case, one Nettie Mann and her husband, John Mann, were jointly informed against for the crime of arson; Nettie Mann being charged with having committed the offense, and her husband with having aided, counseled, and abetted her therein. The accused were tried separately, and on the trial of the husband, subsequent statements and confessions of the wife were admitted in evidence. It is thought that the rule that admitted the statements of the defendant not on trial in that case, would admit them in the case at bar. But the circumstances are not the same. In the case cited, the husband was charged as an accessory before the fact, and it was necessary for the state, in order to convict the accessory, to show the guilt of the principal. Hence, on that branch of the case, the state was at liberty to resort to any evidence that would have been admissible had the principal herself been on trial. It follows, as of course, that the confessions of the principal of having committed the offense were admissible to prove that branch of the case.

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But in the case at bar, both the appellant and Ford were principals in the transaction. They were charged as such, and the guilt of the one in nowise depended upon the guilt of the other. It was not necessary to prove the guilt of Ford in order to convict the appellant. Ford's declarations were, therefore, but hearsay evidence on the trial of the appellant, and cannot be justified on the ground here suggested.

The state's learned counsel, however, contend that there was an abundance of evidence to sustain the conviction outside of the objectionable evidence, and argue that its admission is, for that reason, not so far prejudicial as to require a reversal. But this court has no means of knowing what effect the erroneous evidence had upon the minds of the jury. It may have been the controlling factor that induced the verdict of guilty. Before the erroneous introduction of evidence can be regarded as nonprejudicial, it must clearly appear that it is so. It does not so appear in this instance. The appellant "was deprived of a right which the law accorded him, objected to the deprivation and duly excepted, and the presumption is that he was injured thereby." *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103.

The instructions excepted to require no especial consideration. Being founded upon evidence erroneously admitted, they are in themselves erroneous.

The judgment of conviction is reversed, and a new trial awarded.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9794. Department One. November 25, 1911.]

GUSTAVUS S. KENDALL, *Appellant*, v. MINNIE S. LONG,
Respondent.¹

PUBLIC LANDS—HOMESTEAD—RELINQUISHMENT—CONTESTS—PRESUMPTIONS—DISPOSITION—CONCLUSIVENESS. The presumption that a homestead relinquishment pending a contest is due to the contest does not attach where the contest was dismissed for the reasons that it was irregular, that no fees had been paid and that no notice was given; and failure to appeal from such a dismissal precludes the contestant from asserting the regularity of the contest in the courts.

PUBLIC LANDS—PROCEEDINGS OF LAND DEPARTMENT—REVIEW BY COURTS. A party aggrieved by a decision of the land department disposing of public lands should exhaust his remedies before the department, and the courts will not interfere in the absence of equity.

PUBLIC LANDS—HOMESTEAD—RELINQUISHMENT—CONTESTS—PRESUMPTION. The presumption that a homestead relinquishment pending a contest was due to the contest is overcome where it was shown that the relinquishment was decided upon without notice of the contest, and instead of being a procuring cause, had rather a deterrent effect.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered February 24, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to establish a trust in real property. Affirmed.

W. H. Abel (Sleman & Lerch, of counsel), for appellant.

Hayden & Langhorne, for respondent.

FULLERTON, J.—The appellant brought this action against the respondent, seeking to charge her as a trustee holding for his benefit the legal title to the northeast quarter of section 24, in township 15, north, of range 6, west of the Willamette meridian. The respondent holds the land by patent

¹Reported in 119 Pac. 9.

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from the government of the United States, having acquired the same by entry under the timber and stone act and the acts amendatory thereof. The appellant claims the same in virtue of an attempted entry made by him under the homestead acts. He conceives that the land was awarded to the respondent through a misconstruction of the law by the officers of the land department, whereas a proper construction would have awarded the land to him.

The facts giving rise to the controversy are not seriously in dispute. It appears that the land first became subject to entry at 9 o'clock p. m. of July 2, 1903, at the land office situated at Olympia, in the state of Washington. At that time one Thomas J. Long, husband of the respondent, and Gustavus S. Kendall, the appellant, made simultaneous applications to homestead the land, each alleging a prior settlement thereon. It thereupon became necessary to determine who had the better right, and a hearing was had for that purpose before the local land office, which determined the right in favor of Kendall. An appeal was taken from this ruling to the commissioner of the general land office, who reversed the holding of the local office, and on his ruling being affirmed on appeal to the secretary of the interior, Long was allowed to make a homestead entry on the land. This entry was made on September 8, 1905. On September 12, 1905, four days later, one Andrew J. Jackson filed an affidavit of contest against Long's entry, alleging therein that Long was disqualified to enter the land at the time he offered his homestead application, because he then owned more than one hundred and sixty acres of land within the state of Washington, and had never established nor maintained a residence on the land. Notice of these charges was served upon Long and a trial thereof had, which resulted in a decision in favor of Long by the officers of the local land office. An appeal was also prosecuted from this decision to the commissioner of the general land office, and afterwards to the secretary of the interior, who likewise determined the

case in favor of Long, the contest being finally closed and dismissed in the land office on August 24, 1907, notice thereof being communicated to Long on the next day.

On May 29, 1907, while the last mentioned contest proceedings were pending on appeal, the appellant sent an affidavit of contest to the local land office, averring that Long had never established a residence on the land in question; that he had done nothing more than erect a temporary shack thereon, wholly unsuitable for a residence; and that subsequent to making his entry he had ceased to live on the premises and had wholly abandoned the same; praying that he be accorded a hearing in regard thereto, according to the rules and practice of the land department. On receipt of the affidavit, the register of the local office notified the appellant of the pendency of the contest proceedings instituted by Jackson, and stated that the affidavit would be filed as a junior contest to be held pending the final disposition of the Jackson contest proceedings. The affidavit of contest was not corroborated as required by the rules of the land department, nor was any proceedings taken thereon at that time further than to file the same.

On August 26, 1907, the day after Long was informed that he had been successful in contest proceedings instituted against him by Jackson, he came to the local land office at Olympia and filed a relinquishment of his homestead right. Immediately prior to filing the relinquishment, he made an examination of the official records of the land office and learned for the first time of the filing of the appellant's contest affidavit, no official notice or notice of any kind having ever been sent him of its pendency. Immediately on the relinquishment being filed, his wife, the respondent in this action, made application to enter the land under the timber and stone act. Her application was allowed and she was granted a certificate of entry. Three days later, on August 29, 1907, the register of the local land office rejected Kendall's affidavit of contest against Long's homestead entry, on

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the grounds that his rights had already been adjudicated; that Long was absent from the land at the time the affidavit was filed, on leave of absence granted him by the land department, and his right was not, for that reason, then contestable on the ground of abandonment; that the affidavit failed to set forth sufficient facts to constitute grounds for a contest; and that all the facts set forth in the affidavit had been adjudicated. Notice of this rejection was forthwith sent to the appellant, with the further notice that he had thirty days in which to appeal therefrom to the commissioner of the general land office.

No appeal was taken from the order of rejection, but on September 16 the appellant filed a protest against the entry of the respondent, alleging residence upon the land prior to and at the time of the relinquishment filed by Long, the homestead claimant, and that he had, by reason thereof, "a prior right of entry to said tract under the laws of the United States;" alleging further that the timber entry of the respondent was a fraudulent and collusive entry between herself and her husband, and the result of a conspiracy to defraud the appellant; that the leave of absence granted Long by the land department was granted on false and fraudulent affidavits to the effect that Long was in ill health and unable to live on the land because thereof, whereas in truth and in fact he at all times was in good health; that the sole purpose and object of Long in relinquishing his homestead right to the premises, and his wife in entering the same under the timber and stone act, was to acquire fraudulently a precedence over the homestead application of the appellant, which he alleged was still pending before the land office. He also averred in another paragraph, somewhat in contradiction of his former averments, that the sole purpose of the relinquishment and subsequent entry of Mrs. Long was to avoid the necessity of making a residence on the land and the consequent hardships of pioneer life, and that the secretary

of the interior had held the land to be more valuable for agricultural purposes than for timber.

On September 17, 1907, the register of the local land office dismissed the protest, giving as reasons therefor that the same was not corroborated; that service thereof had not been made upon the timber applicant; that he had no homestead application on file as alleged in the affidavit of protest; and that a certain allegation therein as to the ruling of the secretary of the interior was not in accord with the actual ruling of that official. Later on the respondent offered proof under the timber culture entry, whereupon the appellant appeared and sought to cross-examine the witness and otherwise contest the entry. The right to cross-examine or contest the proofs offered was refused him by the register, and the proofs of entry allowed. The appellant thereupon appealed to the commissioner of the general land office from the several rulings of the local office, and such proceedings were had as to result in the return of the cause to the local office with the following instruction:

"You will, therefore, order a hearing, after due notice to the parties, to determine whether or not, prior to August 26, 1907, the date of the relinquishment of Thomas J. Long, said Kendall had settled and established residence upon the land involved herein, and was a settler thereon at the date thereof. If so, of what such settlement consisted, what improvements were made, and whether said residence has since been maintained thereon; how much of the land has been cultivated, by him, if any; and what, if any, crops have been raised by him on the land; and upon such hearing having been had, you will transmit the evidence, together with your recommendation in the case, to this office for further consideration. In due time report your action hereunder."

Acting pursuant to this instruction, the local office ordered a hearing, at which all of the parties appeared and introduced evidence to substantiate their several claims. After which the office determined that the appellant had not established a residence on the land in good faith, and that

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his homestead application should be rejected, and the proofs of the respondent allowed. From the decision the appellant again appealed to the general land office, assigning, among others, the following errors:

"(3) It was error to fail to hold that Gustavus S. Kendall, upon the filing of the relinquishment of the homestead of Thomas J. Long, had a preference right of entry inuring to him by reason of his contest against said homestead entry, which was pending at the time the relinquishment was filed.

"(4) It was error not to hold that Minnie S. Long had failed to overcome the *prima facie* presumption that the Thomas J. Long homestead entry was relinquished as a result of the contest then pending, of this appellant."

The ruling of the local office was affirmed by the general land office by a decision rendered May 4, 1909. The opinion filed reviewed in detail the evidence introduced, and held that it failed to show that the appellant was a *bona fide* settler upon the disputed land at the time he filed his affidavit of contest or at the time Thomas J. Long filed his relinquishment; holding further that, without such *bona fide* settlement upon the land, he had no standing to contest the entry of Minnie S. Long. From this decision the protestant appealed to the secretary of the interior, again urging the proposition that he was entitled to a preference right to enter the land because the relinquishment of Thomas J. Long had been made while his affidavit of contest was pending. The secretary, however, overruled the contention and affirmed the decision of the local land office. Thereafter patent to the land was issued to Minnie S. Long under her timber entry as before stated.

The statutes of the United States relating to contest over the right to enter public lands provide that, in all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which the land is situated of such cancellation, and shall be allowed thirty days from the

date of such notice to enter such land (§1 Stats. at Large, 141). It is on this provision of the statute that the appellant bases his right to recover. He contends that, presumptively at least, the filing of his affidavit of contest procured the relinquishment and cancellation of the homestead entry of Thomas J. Long, and that he was thereupon, in virtue of this statute, entitled to notice of such relinquishment and cancellation, and to thirty days thereafter to enter the land himself, and that the land department committed error of law when it failed to send him notice of such relinquishment and refused to allow him to enter the land, and in allowing the respondent to enter the land while his contest affidavit was pending. He also contends that the department erred in its subsequent proceedings, in that it failed to give effect to this presumption, or consider it when reviewing his protest against the allowance of the entry of the respondent.

It has been ruled by the land department that a relinquishment filed in the face of a pending contest is *prima facie* presumed to be the result of the contest, and when no counter showing is made, effect has been given to the presumption and the contestant given a preference right to enter the land. The presumption, however, has never been held conclusive. It is the practice to permit it to be shown that the fact is otherwise, in which case the contestant, if he is allowed to enter the land, must show a superior right to other claimants. See *Osborne v. Crow*, 11 Land Dec. 210. In the case before us, it will be observed, the local land office refused to recognize the appellant's contest proceedings as being sufficiently regular to constitute a valid contest, and dismissed the same. It found that he had not paid the land office fees, and had not given notice to the entryman of his contest as required by statute; that his affidavit of contest was not corroborated as required by the rules of practice formulated by the department; and that

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he proposed contesting on grounds that had been the subject of an unsuccessful contest by another person.

If the grounds upon which the local land office dismissed the proceedings were sound, that is, if they were sufficient upon which to base a dismissal, it is plain that no error was committed by the department in failing to give effect to the presumption that would arise were the contest proceedings sufficiently regular. The appellant contended in the court below, and contends in this court, that the contest proceedings were sufficiently regular to constitute a valid contest, but we think he is foreclosed from making this contention by his action concerning the dismissal of the proceedings by the local land office. He took no appeal to the general land office or to the secretary of the interior from that order, and the courts will not entertain a suit in equity to charge the legal title to land under a patent with a trust, based on an erroneous decision of an inferior officer of the land department, when a right of appeal to a superior office therein exists. In other words, a party aggrieved by an erroneous decision of the land department must exhaust his remedies in that department in an effort to obtain relief, before he can resort to the courts for that purpose. So here, since the appellant did not appeal from the order of the local office dismissing his contest proceedings, he must be held bound by the order of dismissal, in so far as the courts are concerned, since he did not avail himself of the relief the rules of the department itself afforded. Nor was it error, under these circumstances, for the department to fail to give effect in the subsequent proceedings to the presumption that arose from the act of relinquishment. That branch of the case was closed by the dismissal of the proceedings, and the appellant was not at liberty to revive it by mere suggestion on the hearing of his protest against the respondent's entry. The department accorded him all of his rights when it entered upon an inquiry as to his relation to the land at the time the respondent's entry was made, dis-

regarding any right claimed under the contest proceedings.

But if we were to conclude that the appellant was entitled to take advantage of the supposed error of the land department, we would still conclude that he could not recover in this action. The primary disposition of the public lands is vested by the constitution of the United States in Congress. That body has passed general laws for their disposition, and vested the administration of them in a special department of its own creation. In the scheme, the courts were awarded no place. They have no direct supervisory control over the department decisions, either by appeal or review. The right of the courts to interfere at all arises from their inherent power to right wrongs that are done to individuals by an erroneous administration of the laws. Where the conviction of the wrong involves the transfer of property from one person to another, the proceeding is equitable in its nature, and the party claiming the right must show that the superior equities are with him. In the case at bar, therefore, it was incumbent upon the appellant to show, not only that Thomas J. Long released his homestead entry while his contest proceeding was pending, but also that the contest proceeding was the procuring cause of the relinquishment. To prove the latter fact, he relied wholly upon the presumption that arose from the fact that the relinquishment was filed while the contest proceedings were pending. But the respondent introduced evidence tending to show that the contest proceeding was not the cause of the relinquishment. It was shown that Thomas J. Long made up his mind to relinquish long before he knew that the contest affidavit was on file; that he went to the land office for that purpose without knowledge of the fact, and learned of the affidavit only after he reached the land office; that the filing of the affidavit, so far from being the procuring cause of the relinquishment, had rather a deterrent effect on the action of Long. The appellant offered nothing to rebut this evidence, and we think he has shown no equity entitling the

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court to charge the respondent as a trustee holding for him the legal title of the lands patented to him. On any view of the case, therefore, the respondent is entitled to an affirmance. It is so ordered.

DUNBAR, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9844. Department One. November 27, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
HARRY DOUGLASS, *Appellant*.¹

SODOMY—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction for sodomy, notwithstanding certain exaggerations in the testimony of the prosecuting witness, where he was corroborated as to the overt act by two other witnesses.

CRIMINAL LAW—EXCESSIVE SENTENCE. A sentence of not less than nine and not more than ten years for sodomy will not be interfered with as excessive, there appearing no gross abuse of discretion.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 31, 1910, upon a trial and conviction of sodomy. Affirmed.

H. C. Dalton and *W. R. Bell*, for appellant.

John F. Murphy, *Hugh M. Caldwell*, and *H. B. Butler*, for respondent.

PER CURIAM.—The appellant was charged by information with the crime of sodomy, committed upon the person of a boy of the age of thirteen years. On a trial before a jury, he was convicted, and was afterwards sentenced by the court to a term in the penitentiary of not less than nine nor more than ten years. From the judgment and sentence, he appeals, assigning as error that the evidence is insufficient to justify the verdict, and that the sentence is excessive. On

¹Reported in 118 Pac. 915.

the first ground assigned, appellant bases his claim for reversal upon the contention that the prosecuting witness' testimony was so uncertain and contradictory as to be unworthy of credence, but we think the question was one wholly within the province of the jury. The witness did make an exaggerated statement as to the number of times a certain thing had been done, and then afterwards admitted that his statement as to the number was not exactly true, but if this was sufficient to warrant the interference of the court had the statement been wilfully made, we think it insufficient in the particular case. It is plain the witness did not mean to be exact in his first statement, much less that he intended to commit perjury. The mode of expression used was only his manner of saying that the act occurred a great many times. Moreover, the witness was corroborated, in his statements as to the overt act charged against the appellant, by two other witnesses; and notwithstanding the appellant denied the charge and produced witnesses as to his good character, we are constrained to hold that the questions of fact were properly submitted to the jury, and that their findings are conclusive on this court.

The sentence imposed was within the discretion of the trial judge, and we have heretofore expressed our doubts as to our power to interfere. *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897. Certainly we would not interfere unless there appeared to be a gross abuse of discretion on the part of the trial court. No such abuse appears here.

The judgment is affirmed.

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Opinion Per MORRIS, J.

[No. 9689. Department Two. November 28, 1911.]

JOSEPH COE *et al.*, *Appellants*, v. JOHN ROSENE,
Respondent.¹

BANKRUPTCY—DISCHARGE—REVIVAL BY NEW PROMISE—REQUISITES.
A letter by a bankrupt stating that he had paid some and expected to pay more of his discharged debts, specifying one that would be the next one, followed by another letter stating that he would hold the promise good but did not know when he could do what he wanted to, is not sufficient to revive the debt, under the rule that the new promise must be clear, distinct and unequivocal.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 10, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Geo. H. King (*M. G. Smith*, of counsel), for appellants.
Kerr & McCord, for respondent.

MORRIS, J.—This case involves the sufficiency of a promise to revive a debt discharged in bankruptcy. The facts are these: In February, 1900, respondent filed a petition in bankruptcy in the United States district court at Chicago, and obtained his discharge in due time thereafter. Among the claims allowed were two notes given to Cephas Coe, one for \$4,500, the other for \$3,000. Cephas Coe died in 1903, and the appellants are his administrators. In November, 1903, Joseph Coe, as such administrator, wrote respondent a letter, in which he informed him of the death of Cephas Coe, and requested a payment upon these notes. Respondent replied to this letter, saying, in so far as is here material:

"I regret that I cannot comply with your request. I had expected to do something of that kind last spring, but unexpected matters prevented me. I am now on my way to Europe and things may be different when I return. . . .

¹Reported in 118 Pac. 881.

Yes, I have paid quite a few of the old losses, expect to pay more, and the next one shall be to the family of my departed friend."

In September, 1904, R. G. Coe, another brother of Cephas Coe, wrote respondent a letter, making a similar request, to which respondent replied in part:

"Replying to yours of the 9th inst., I advised your brother Joseph last winter that circumstances had obliged me to discontinue sending checks east; but that I held my promise to Cephas good, but do not know when I can do what I want to."

In addition to the letters, appellant relies upon an alleged oral promise made to W. H. Hill, an attorney representing the appellants, in August, 1909, wherein respondent told Hill he would pay the \$4,500 note, with interest, unless he was barred from doing so by his exemptions; that he had no recollection of the \$3,000 note, but if Hill could furnish him any evidence of that indebtedness, he would pay that as freely as the \$4,500 note. Respondent admits having a conversation with Hill, in which Hill sought to obtain some money from him upon the indebtedness of these two notes, but denies making any promise of any nature to pay either of them. Mr. Hill's testimony was taken by deposition, and there is a sharp conflict between him and respondent as to any promise to pay either of these notes. The court has made an express finding that no promise was made to any person at any time, and refused appellants' request to find a promise made to Hill.

After reading the deposition of Hill and the testimony of respondent on this point, we cannot say the trial court was in error in holding adversely to appellants as to the promise to Hill. There is no such preponderance in favor of appellants as to justify us in making a contrary finding. We are therefore brought back to the two letters to determine if they contain a sufficient promise to pay the notes to justify a holding that the debt was revived. Many cases have been

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Opinion Per MORRIS, J.

cited in the briefs, and we have made an independent examination of the authorities. They all agree upon two propositions: (1) In order to revive a debt discharged in bankruptcy proceedings, the new promise must be clear, distinct, and unequivocal, as well as certain and unambiguous. Our own cases, in discussing the nature of the promise necessary to defeat the bar of the statute of limitations, establish this rule. *Lieberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998; *Bank of Montreal v. Guse*, 51 Wash. 365, 98 Pac. 1127; *Thisler v. Stephenson*, 54 Wash. 605, 103 Pac. 987. (2) The mere acknowledgment of a debt or the expression of an intention to pay is not sufficient to revive the debt. *Elwell v. Cumner*, 136 Mass. 102; *Brewer v. Bonyton*, 71 Mich. 254, 39 N. W. 49; *Allen & Co. v. Ferguson*, 85 U. S. 1; *Yoxtheimer v. Keyser*, 11 Pa. St. 364, 51 Am. Dec. 555; *Bartlett v. Peck*, 5 La. Ann. 669; *Riggs v. Roberts*, 85 N. C. 151, 39 Am. Rep. 692.

Applying these principles to the two letters, we cannot find a sufficient promise in either to revive this debt. In the first letter respondent says:

"Yes, I have paid quite a few of the old losses, expect to pay more, and the next one shall be to the family of my departed friend."

This language cannot be said to be a certain, clear, distinct, and unequivocal promise to pay these notes. The debtor says he has paid many of the "old losses," and expects to pay more. Nothing here of the nature of the legal requirements. The promise must be found in the next clause when read in connection with what precedes it: "and the next one;" that is, the next old loss; not that he clearly, distinctly, and unequivocally promises to pay, but that he *expects* to pay, "shall be to the family of my departed friend." An expectation to pay, or a present intention to pay, cannot be construed into a promise to pay. "Expect to pay" is nothing more than a desire, willingness, or intention to pay. The law requires more. It can be satisfied only with a dis-

tinct and clear promise to pay. To hold that, when a man announces he expects to do a thing, he thereby obligates him with a liability to do that thing, is to go further than we are willing to hold. We cannot find any words of promise in this letter. It contains nothing more than an acknowledgment of the debt and an expression of an intention to pay it, which, under all the authorities, is not sufficient. The second letter is even weaker in its language. He says he holds his promise "to Cephas good;" that is, he acknowledges the debt. Then he says, "but do not know when I can do what I want to." If this means anything, it is that he wants to pay the debt, wants to make his promise to Cephas good, but does not know when he can. To *want* to pay means to wish to pay, to desire to pay; but it is not a promise to pay. It can hardly be said to be an intention to pay. If it can be said to be the expression of an intention to pay, it assuredly can mean nothing more.

Not finding in either of these letters anything upon which to base appellants' contention, the judgment of the lower court is affirmed.

DUNBAR, C. J., CROW, and ELLIS, JJ., concur.

[No. 9567. Department One. November 28, 1911.]

EMPIRE STATE SURETY COMPANY, *Respondent*, v.
O. H. BALLOU *et al.*, *Appellants*, OTTO H. SIEFERT
et al., *Respondents*.¹

INDEMNITY—LIABILITY — DISCHARGE — PARTNERS AS PRINCIPALS—
DEPOSIT AS LIMITATION ON LIABILITY. Where a surety company guaranteed the construction of a building by a copartnership, taking as indemnity a deposit of \$1,000 in money from one of the partners, his liability is not limited to the deposit, as all the partners are liable as principals; hence use of the deposit to discharge claims does not release the partner making the deposit from further liability.

¹Reported in 118 Pac. 923.

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Opinion Per MOUNT, J.

HUSBAND AND WIFE—COMMUNITY PROPERTY—TITLE IN TRUST—DEED OF TRUSTEE. The title to land agreed to be conveyed to a builder in part consideration for his work, does not pass to the community consisting of himself and wife, before deed; and being held in trust, the deed of the trustee at request of the husband passes title without any conveyance by the wife.

MORTGAGES—INDEMNITY MORTGAGE—CONSIDERATION. Where a surety company guaranteeing a building contract had already advanced money or subsequently advanced it, a deed of property given as indemnity is supported by a sufficient consideration, although it was volunteered.

MORTGAGES—FORECLOSURE—VENUE—JURISDICTION. Under Rem. & Bal. Code, § 1016, providing that a mortgagee may foreclose in the superior court of the county where the land or some part of it lies, two trust deeds of lands in two counties may be foreclosed by an action in either county.

PRINCIPAL AND SURETY—RIGHTS OF SURETY—EXHAUSTION OF REMEDY AGAINST PRINCIPALS. Where the principals gave indemnity to a surety company guaranteeing a building contract, the surety company has the right to exhaust the indemnity and liability of the principals before recourse to the liability of a volunteer surety for the principals.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 24, 1911, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to enforce an indemnity agreement and to foreclose certain trust deeds. Affirmed.

Jas. W. Carr, for appellants.

John P. Hartman, for respondent Empire State Surety Company.

Gill, Hoyt & Frye and *R. L. Blewett*, for respondent Hink.

MOUNT, J.—The plaintiff brought this action to recover against O. H. Ballou, Otto Siefert, and Elmer Weston, as copartners, the sum of \$2,547.35, with interest, attorney's fees, and disbursements upon a guaranty agreement; and also to foreclose two trust deeds, which were alleged to be mortgages to secure the plaintiff against loss upon a surety

bond. The other defendants were alleged to claim some interest in the property sought to be foreclosed, except Otto Hink, who was a surety or indemnitor to the plaintiff. Upon the trial of the case, the court found that the defendants were indebted in the sum named, and that the two deeds were in fact mortgages, and entered a decree of foreclosure. The defendants O. H. Ballou and wife have appealed.

It appears that, in December, 1908, the appellant Ballou, under the trade name of "Building Company of San Francisco," had agreed to sell to John Payne and wife a certain lot in the city of Seattle, and to erect a building thereon within a given time for a consideration of some \$33,000, \$20,000 of which was to be paid in cash, \$7,500 was to be paid by real estate in Port Townsend, Jefferson county, Washington, and the remainder by mortgage upon the premises which were to be improved. The appellant Ballou, under the name of the building company, agreed to furnish an indemnity bond to Payne and wife for the completion of the building free from liens. On January 21, 1909, O. H. Ballou, Otto Siefert, and Elmer Weston entered into a written agreement of copartnership for the purpose of constructing the building above named at a cost of \$18,000. In these articles of copartnership, it was agreed that each should share the profits and losses equally, but that the bond to be furnished should be paid for, one-half by Ballou and one-half by Siefert and Weston.

On January 20, defendant Ballou, under the name of the Building Company of San Francisco, applied to the plaintiff for a surety bond in the sum of \$15,000, and upon the same day, each of the partners above named and one Otto Hink entered into an agreement to indemnify the surety company against loss. One of the trust deeds in suit was executed by Siefert and wife, and delivered to the surety company as indemnity, and at the same time \$1,000 in money was deposited with the surety company by Ballou for the same purpose. The surety company thereupon issued the bond

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guaranteeing the construction of the building above named, and against liens, etc. The partnership above named thereupon entered upon the construction of the building, but before it was completed, Siefert and Weston seem to have abandoned the work and Ballou proceeded to the completion of the building. In the meantime, the surety company advanced \$3,547.35 in the payment of liens and claims, and \$700 for attorney's fees and other costs in regard thereto. The surety company used the \$1,000 deposited by Ballou in part payment of these claims. So that the actual outlay of the surety company in money was \$2,547.35 and the other costs. During the construction of the building, Mr. and Mrs. Payne, at the request of Ballou, executed a trust deed of the Port Townsend property to the plaintiff as additional indemnity. Later this action was begun by the surety company to recover against all of the partners, and to foreclose the two trust deeds named.

It is argued by the appellant Ballou that he was not an original guarantor, but was merely a guarantor with a limited liability, and that when the surety company used the \$1,000 which he had advanced, his liability as a guarantor ceased, and the company could not enforce further liability against him. He testified, in substance, that his codefendants, Siefert and Weston, undertook to obtain the surety company bond, and in order to do so, offered certain property by way of security to indemnify the surety company against loss, but that the surety company was not satisfied with the property offered by Siefert and Weston, and that appellant thereupon deposited with the surety company \$1,000 in money to satisfy a demand for more security.

The fallacy of his position is that the appellant Ballou was not only a surety or guarantor as to the security which he gave for Siefert and Weston, but he was also a principal for whom the bond was given. As between the surety company and the partnership consisting of Ballou, Siefert, and Weston, each of the partners was liable to the surety

company for the whole loss. There is nothing in the evidence to show that the surety company accepted the deposit from Ballou for Siefert and Weston, and released, or intended to release, the principals, or any of them, from liability which might thereafter accrue upon the bond. There was, therefore, no limited liability as between the surety company and Ballou.

Appellants next argue that the transfer of the Port Townsend property to the surety company was without consideration, and that the property was community property of himself and wife, and that the wife never consented to the transfer. The evidence shows that the legal title of this property never passed into the community of Ballou and wife. The property was deeded directly by Payne and wife to the surety company, in trust. It was, therefore, not necessary for either Ballou or his wife to join in the conveyance. It is true that the surety company did not demand the additional security, and that Ballou voluntarily caused the property to be deeded to the surety company, to make good "any loss or deficit arising under a certain contract made between myself [the building company of San Francisco] and John and Ruth Payne only." This contract was the one to build the building. The fact that the surety company accepted the deed when they had already advanced money or subsequently advanced it, was a sufficient consideration.

Appellants next argue that the superior court of King county, where the action was brought, had no jurisdiction over the Jefferson county real estate. The statute provides that a mortgagee "may proceed in the superior court of the county where the land or some part thereof lies, to foreclose the equity of redemption contained in the mortgage." Rem. & Bal. Code, § 1016. In *Commercial Nat. Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267, it was held that, where a mortgage covers land lying in two counties, foreclosure may be had in either county, and the reasons therefor

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are there stated. The superior court of King county therefore had jurisdiction.

Appellants lastly argue that the court erred in not rendering a judgment against Otto Hink. It is apparent that Mr. Hink was a volunteer surety without interest in the contract. It was therefore just that the partnership property and the property of each of the partners should be made to respond before recourse was had upon Mr. Hink. 23 Cyc. 234; 27 Am. & Eng. Ency. Law (2d ed.), 463. If it is a fact, as appellants apparently claim, that Hink was a surety for Siefert and Weston to appellant, that fact does not clearly appear, and if it did, it would not affect the right of the surety company to foreclose the mortgage in this action.

Judgment affirmed.

DUNBAR, C. J., PARKER, GOSE, and FULLEBTON, JJ., concur.

[No. 9608. Department One. November 28, 1911.]

C. H. HANSON *et al.*, *Appellants*, v. JOHN W. CARR *et al.*,
Respondents.¹

TAXATION—TAX TITLE—PRIORITY—EASEMENTS. Under Rem. & Bal. Code, § 9230, providing that a tax lien shall have priority over all other liens or claims, a tax foreclosure and sale passes the fee freed from a prior easement for a private road, where the owner of the easement prior to foreclosure did not seek a segregation of the tax as to the strip of land affected by the easement.

TAXATION—REMEDIES OF PURCHASERS—QUIETING TITLE—LIMITATIONS. A tax title purchaser who has paid all the taxes since foreclosure may maintain an action to quiet title within ten years from the date of foreclosure.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 3, 1911, in favor of the

¹Reported in 118 Pac. 927.

defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

L. H. Wheeler, for appellants.

Jas. W. Carr, for respondents.

MOUNT, J.—The plaintiffs brought this action to quiet their alleged title to a strip of land thirty feet wide along the entire length of the south side of the northeast quarter of the northeast quarter of section 32, township 23, north, range 6 E., W. M., claiming title thereto by mesne conveyance from the United States, and also by virtue of a tax judgment and sale made by the county of King in 1900 for delinquent taxes for the years 1890 to 1895 inclusive. Defendants claim an easement upon the land by grant from the owner prior to the tax sale, and by continuous use for more than ten years. Upon the trial of the case, the court found that, in August, "1892, William Thomas, being then owner and holder of the legal title of the" forty acres described above, "conveyed unto John Stanton a strip of land, thirty feet in width, along the entire length of the south side thereof, to be used as a private road by said grantee, his heirs and assigns, and by said William Thomas, jointly; that by mesne conveyances, the same was thereafter conveyed by said John Stanton and his grantees to the defendants herein; and that they are now, and were at the commencement of this cause, the owners and holders of the title to said private road." Upon this finding, a decree was entered, quieting title in the defendants and dismissing the plaintiffs' complaint. Plaintiffs have appealed.

It was conceded in the trial court, and is also conceded here, that the land was sold in the year 1900 upon a foreclosure of a tax lien for delinquent taxes for the years 1890 to 1895 inclusive, and that plaintiffs hold under a tax deed issued thereon. The validity of that foreclosure is not questioned, but it is argued by defendants that their easement,

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obtained by a grant from the owner of the land in 1892 and prior to the tax foreclosure proceedings, was not affected by such sale. It is plain that this is not the rule, because the statute provides that all taxes imposed upon real estate shall be a lien thereon.

"The said lien shall have priority to and shall be fully paid and satisfied before any recognizance, mortgage, judgment, debt, obligation or responsibility to or with which said real estate may become charged or liable." Rem. & Bal. Code, § 9230.

In short, the tax lien is paramount to all other liens or claims. When foreclosure of such lien is made and real estate is sold thereunder, the fee passes to the purchaser, and all grants made by the owner of the fee must, of course, fall with the foreclosure. In *Carlson v. Curran*, 42 Wash. 647, 85 Pac. 627, 6 L. R. A. (N. S.) 260, where it was sought to establish the relation of landlord and tenant after a tax foreclosure, we said:

"The relation of landlord and tenant does not arise by reason of the tax sale, as the appellants acquired their title, if any, from an independent source, and took the property free from any contracts or obligations of the former owners."

This must be the rule. Otherwise the owner of real estate may grant an easement or leasehold and surrender possession of the real estate to such grantee, and, upon foreclosure of the tax lien by the state, the purchaser would acquire only the fee, subject to the easement or lease, which would destroy the priority of the tax lien. The tax foreclosure being regular against the land and not attacked, a deed issued thereunder vested the title in fee with the right to possession in the purchaser at the foreclosure sale, and divested the owner and all claiming under him of all right to the land. No doubt the defendants, prior to the foreclosure proceedings, might have had the land upon which their easement was located segregated, and a *pro tanto* reduction of

the tax, under Rem. & Bal. Code, § 9258. *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391. But having neglected that remedy, it is too late to say that the easement did not go with the land to the purchaser at the tax sale.

It is not claimed that the ten-year statute has run in favor of the respondent since the tax foreclosure sale, and it is not claimed that defendants have ever paid any taxes on the land upon which the easement is claimed. On the other hand, plaintiffs have paid all the taxes thereon. It is apparent that the statute of limitations has not run in either case. We are satisfied, therefore, that the trial court should have found that defendants had no easement or right upon the strip of land in question, and should have quieted title in the plaintiffs.

The judgment is reversed, and the cause remanded for the entry of such a judgment.

DUNBAR, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9745. Department One. November 28, 1911.]

JULIUS ALBERG, *Respondent*, v. CAMPBELL LUMBER
COMPANY, *Appellant*.¹

RAILROADS—OPERATION—SWITCHES AND FROGS—STATUTES—EFFECT. Laws of 1899, p. 49, § 1, providing that any person or company operating a railroad is required on or before the first day of October, 1899, to guard frogs and switches, applies to railroads organized after the act went into effect.

SAME—APPLICATION OF STATUTES—"RAILROADS"—PRIVATE LOGGING ROAD. Laws of 1899, p. 49, § 1, providing that any person or persons, railroad companies or corporations, owning or operating a railroad or railroads in this state, shall guard frogs and switches, applies to a logging road of a mill company used in getting out logs to the mill, and not engaged in public service as a common carrier.

RAILROADS—OPERATION—FROGS AND SWITCHES—LIABILITY—PARTIES—STATUTES—CONSTRUCTION. Section 2 of the act of 1899 (Rem.

¹Reported in 119 Pac. 6.

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& Bal. Code, § 8683), requiring railroad companies to guard frogs and switches, which provides that the company shall be liable for any damage received from a failure to comply with the provisions of the act, "such damages to be recovered by the parties entitled to recover as provided" by specified sections of the code, which relate to actions for wrongful death by heirs and representatives, does not limit the right of action to injuries from which death results, the object being only to extend the liability to actions for wrongful death.

MASTER AND SERVANT—INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. An employee in a logging camp, whose foot caught in an unblocked frog while attempting to board an engine, is not guilty of contributory negligence, as a matter of law, the same being a question for the jury, where it appears from his testimony that he was called upon to board the engine, upon which were many men, and that he was looking for a place to get on and failed to see the frog, that the place he sought was not dangerous and was a good place to stand, and the evidence shows that the engine started up without any warning.

SAME—CONTRIBUTORY NEGLIGENCE—DANGEROUS PLACE—PROXIMATE CAUSE. Where an employee was injured while attempting to board an engine, the engine starting up without warning while his foot was caught in a frog, contributory negligence in seeking to ride upon the cowcatcher, or in walking on the track until he reached the engine, will not preclude a recovery, since the proximate cause was the starting of the engine without warning, and the injury was not caused by dangers incident to riding on the cowcatcher or walking on the track.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 26, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a logger run over by a logging engine. Affirmed.

Hastings & Stedman, for appellant.

Wm. Martin, for respondent.

DUNBAR, C. J.—Julius Alberg, a logger employed by the Campbell Lumber Company as second faller, that is to say, assistant to the principal faller, received an injury on December 6, 1906. He was at that time twenty-three years of age. After the injury, he brought this action to re-

cover \$27,480 on account of said injury. Negligence of the company was alleged in failing to fill, block, or guard a frog on the track, and in having incompetent engineers to conduct the train. Upon the trial of the cause to a jury, verdict was rendered in favor of the plaintiff for \$6,500. Motions for new trial were made by the defendant, and plaintiff also. The motions were overruled, and appeal followed.

The proof shows that it was the custom for the men working in the woods to gather at the switch at or near the place where respondent was injured, and board the engine or a car for the purpose of being carried to the camp, a distance of about two miles. On the day the respondent was injured, he, in company with his fellow workmen and the boss of the crew, came down to a road which crossed the track some sixty feet from the switch. The engine came down from the woods with two loaded cars of logs, and stopped at the switch. Some one on the engine hallooed at the men. The respondent, with the other men, including the superintendent, Mr. Matson, started to get on the engine. Mr. Matson had entire charge of the camp and direction of the starting and stopping of the train. There were some fifteen or twenty Japanese working for the company, looking after the railroad at that time. They usually rode home on a handcar, but on this day, for some reason not necessary to be mentioned, the Japanese, not having a handcar available, began to get upon the engine with the other men for the purpose of riding to the camp. The engine was standing about four feet from the frog which was the cause of the respondent's mishap, waiting for the men to come from about sixty feet up the track to get on. When the respondent was about four or five feet from the engine, and as he was looking for a place to get upon the engine, his foot slipped in the frog, which was not protected, and he was unable to get it out. About that time the engine, without any notice, started toward the respondent who, seeing that he could not extricate

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himself from his perilous position, threw his body off the track, and the engine passed over his foot and crushed his foot and leg so that it had to be amputated just below the knee.

This action is based upon chapter 35, page 49, of the Laws of 1899, section 1 of which is as follows:

"Any person or persons, railroad companies or corporations, owning or operating a railroad or railroads in this state, shall be and are hereby required on or before the first day of October, 1899, to so adjust, fill, block, and securely guard the frogs, switches, and guard rails on their roads as to protect and prevent the feet of employees and other persons from being caught therein."

It is the contention of the appellant that, inasmuch as this defendant corporation was not incorporated until the 8th day of April, 1905, which was several years after the passage of the act, the act in terms does not apply to it, and applies only to corporations then in existence. There can be no merit in this contention, as it certainly is not the legislative policy to have the laws reenacted for the benefit of corporations which are created after the passage of the act, or for the benefit of individuals who may be born after the passage of the act, or who may come into the country and be admitted to citizenship after the act. We know of no such construction that has ever been placed upon a general law.

It is also the contention of the appellant that the act in terms does not apply to railroads used in connection with mills, and only applies to common carriers, and that, as it appears that this was exclusively a logging railroad used by the Campbell Lumber Company in getting logs from the woods, and was not a railroad engaged in public service as a common carrier, the act does not apply to it. *Williams v. Northern Lumber Co.*, 113 Fed. 382, among other cases, is cited to sustain this view. But an examination of that case convinces us that it is not in point. It is true that the court

in that case decided that a certain statute of Minnesota did not apply to railroads other than common carriers; but while the statute is not set forth, it is evident, from the language of the opinion, that it was not such a statute as we have under construction. The court, in the course of its opinion, says:

"It does not come within the language of the statute, because it is not a railroad corporation; and the proviso in the statute indicates that the statute is intended to apply only to corporations of the character to which I have referred, possessed of franchises, open to public travel or use, because the proviso is that they shall not be liable for damage during the construction of a new road not open to public travel or use."

Our statute not only fails to indicate that the law does not apply to other than railroad corporations which are common carriers, but it expressly provides that it shall apply to any person or persons, railroad companies or corporations, owning or operating a railroad. The scope of the act indicates that it was intended to protect workmen or employees of railroads, whether such railroads were common carriers or not, and whether they were corporations or individuals. The language is so plain and comprehensive that it is difficult to base an argument upon its construction. The other cases cited do not sustain appellant's contention.

Again, it is contended by the appellant that, even though it be conceded that the act applies to railroad companies other than common carriers, the respondent is not granted the right to bring an action under this statute, by reason of the provisions of § 2, which is as follows:

"Any person or persons, railroad companies or corporations owning or operating a railroad or railroads in this state, shall be liable for any damage received from a failure to comply with the provisions of this act; such damages to be recovered by the parties entitled to recover as provided in sections 137, 138 and 139 of volume 2 of Hill's Annotated Codes and Statutes of Washington, being sections 4827, 4828 and 4829, Ballinger's Annotated Codes and Statutes

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of Washington." Laws 1899, p. 49, § 2 [Rem. & Bal. Code, § 8683.]

A reference to the sections quoted renders the meaning of § 2 of the statute a little doubtful, but it certainly never was the intention of the legislature, in the passage of the act of 1899, to give the benefit of that act only to the representatives of persons who had been killed, or who were suing for the death of the persons mentioned in those sections. The evident intention was that, in case of death resulting from the negligence prohibited in the act, the representatives of the parties suing should be the representatives provided for in the sections quoted in the act. But, however that may be, it is not material to the determination of this case, for the law, in § 1, imposes a duty upon the appellant, and prescribes, in effect, that the omission of certain acts shall constitute negligence on its part. That would be sufficient in any event for the respondent to base an action on for negligence on the part of the appellant. If the act of negligence was proven, the case would stand just the same as though the act, or omission of the act, was negligence at the common law.

The main contention in the case is that the respondent was guilty of contributory negligence in attempting to get upon the engine under the circumstances proven. In discussing this phase of the case, it will be necessary for us to notice only the testimony of the respondent, and that in substance is as follows:

"A. When we got to the road the engine was up at the switch, and somebody called for us to go up there and to get on. Q. About how far was it from where you were standing when they called for you to go and get on the engine? A. About sixty or seventy feet, I think, and, of course, we walked up that way, and as I came pretty close to the engine I stepped in that frog there and I was looking to get on the engine because there were lots of men on the engine, and I was looking to get on the foot board, because there was a pretty good place to stand on, and lots of places

were taken up by the other men on the engine, and when I was caught in the frog, about the same time the engine started up and it was close by me and I could not get out of the way, so I turned round and my foot was in there, and the engine ran over my foot and that is about the way it happened. Of course, after that they picked me up and took me down to the camp."

The testimony shows also that no bell was rung, or any warning given to anybody that the engine was about to start; that the foreman, Matson, was with the respondent, and was trying to get up on the engine at the same time; that the engine was started by a young boy, a son of the superintendent of the road, who had no knowledge of the engine and no discretion in regard to such matters. The respondent was called and recalled in cross-examination and redirect examination many times, but the proof was substantially as we have indicated.

It is claimed by the appellant, and the record shows, that the judge who tried the cause expressed grave doubts of the right of the respondent to recover under the circumstances shown by the proof, but said that he would submit the case to the jury. The court being in grave doubt as to whether the respondent was guilty of contributory negligence was the best of reasons for submitting it to the jury.

The appellant strongly contends that the respondent was attempting to get upon the cowcatcher for the purpose of riding into camp, and that this was gross negligence. It appears from the testimony of the respondent that he was attempting to get upon a platform which, so far as we are able to ascertain from the testimony, may have been attached to the cowcatcher, which was attached to the engine; but he testifies that it was a place where he could stand, and where he could hang on, and that it was not a dangerous place.

But, even conceding that riding on the cowcatcher was such an act of negligence as would preclude a recovery for injuries caused by dangers incident to riding on the

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cowcatcher, that principle is not applicable to this case; for such dangers were not the cause of the accident, proximate or otherwise. The proximate cause of the accident unquestionably was the starting of the engine without notice, while the men gathered there were attempting to get upon the engine.

The case strongly relied upon by the appellant, viz., *Birrell v. Great Northern R. Co.*, 61 Wash. 336, 112 Pac. 362, was where an accident occurred by reason of the perils of the place which were the actual cause of the injury. A dining car conductor left a well-known path, between tracks, six feet wide from tie to tie, and took a walk along the edge of a swamp near the outer ties where the space was only two and a half feet, and was in consequence struck and killed by a switch engine. It will be seen that the principle governing that case was altogether different from the principle governing the case at bar, where the safety or nonsafety of the cowcatcher had no remote influence upon the accident.

It is also contended by the appellant that it was contributory negligence for the respondent to run or walk the distance that he did, which was sixty or seventy feet, on the track or inside of the railroad tracks. But the result in this case would have been the same if the respondent had approached the track at the point where his foot was caught in the frog, because no injury happened to him by traversing the road back of that point; and it seems from all the testimony that it was necessary for the men to go on the track at least that short distance from the engine.

Many cases are cited by both appellant and respondent in support of their respective contentions, but the law in relation to the duties of the master, and the correlative duty of the servant in regard to contributory negligence, is so well understood that the citing of cases is of very little aid to the court. The important question is not what the law is, but whether the facts in the particular case bring it within the provisions of the law as understood. Under all the cir-

cumstances of this case, we are unable to say that the action of the respondent in attempting to board this engine, under the circumstances shown by the respondent's testimony, was contributory negligence as a matter of law. On the contrary, it was a case where it was the peculiar province of the jury to determine that question.

No error was committed by the court in the giving or refusing of instructions, and the judgment is therefore affirmed.

PARKER, MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9795. Department One. November 28, 1911.]

J. W. MARTENIS *et al.*, *Appellants*, v. THE CITY OF TACOMA,
Respondent.¹

MUNICIPAL CORPORATIONS—ASSESSMENTS—BENEFITS—AWARD OF COMPENSATION AS BAR TO SUBSEQUENT ASSESSMENT. LAWS 1907, p. 321, § 15, providing that for improvements to be paid by special assessment upon property benefited, the compensation found by the jury shall be irrespective of any benefit from the improvement, does not require a city, on condemning land for opening a street, to include the improvement of the street or the establishment of a grade; hence the award of damages for compensation for merely opening a street does not bar an assessment for benefits in a subsequent proceeding to grade and plank the street.

SAME—PROCEEDINGS—ISSUES. Under a proceeding to condemn land for the opening of a street pursuant to an ordinance which did not provide for an established grade or any improvement of the street, an award of damages precluding any assessment for benefits on account of the condemnation, does not bar an assessment for benefits in a subsequent proceeding to establish a grade and improve and plank the street; notwithstanding that the city attorney in the first proceeding went beyond the issues in propounding questions to the jury, who were instructed to award damages that will be sustained by the "construction of the proposed road," there having been no evidence thereon or on the question of damages by reason of any improvement of the roadway.

¹Reported in 118 Pac. 882.

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Opinion Per FULLERTON, J.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered July 5, 1911, confirming an assessment roll for a local improvement, after a hearing on the merits before the court. Affirmed.

John A. Shackelford and *Theo D. Powell*, for appellants.

T. L. Stiles, *Frank R. Baker*, and *Frank M. Carnahan*, for respondent.

FULLERTON, J.—On July 2, 1905, the city of Tacoma passed an ordinance authorizing and directing the city attorney to institute and prosecute an action in the name of the city for the condemnation of a specifically described tract of land “to be used as and for a public street, and for the purpose of laying out, opening, and providing a street” between certain designated terminals. The proposed street lay wholly on the property of the appellants. The ordinance provided that payment for the tract so taken should be made by an assessment against the property benefited by the establishment of the street. No grade was established for the proposed street, nor was any provision made for its improvement, the ordinance simply providing for the acquisition of the naked title to the land within the boundaries of the street. Acting pursuant to the directions of the ordinance, the city attorney instituted proceedings against the owners of the property, asking its condemnation. Appearances were made by the respective owners, and a trial had on the issues made by the petition. At the trial, certain questions were asked concerning the benefits that would accrue by the establishment of a roadway over the land sought to be condemned, but no evidence was offered, on either side, of any proposed or established grade for the roadbed, nor was anything said as to the character of the improvement the city subsequently proposed to make when it opened the street. At the conclusion of the trial, the court, among other instructions, gave the following:

“You must also award to these defendants, in addition to

the value of the land which is taken from them, the value of any damages which you shall determine they will sustain by reason of the construction of the proposed road through their property, and you will make separate findings on these two facts."

The jury thereafter brought in a verdict, finding in favor of the landowners for the value of the land taken \$1,500, and for damages to the remaining land \$650. Judgment of condemnation was thereafter entered, and the awards paid.

Subsequently the city established grades along the street, and caused the same to be improved by bringing it down to the established grade and "laying down on said roadway a pavement of plank," assessing the cost thereof to the property benefited by the improvement. Among the properties assessed, was the property of the appellants, the same property the jury found had been damaged by the laying out of the street through the same. The appellants objected to the city council against the assessment, and on their objections being overruled, appealed to the superior court of Pierce county from the order entered. The superior court upon a hearing affirmed the assessment, and this appeal was taken from the order of affirmance.

The appellants urge but one proposition in this court. They contend that the finding of the jury and the judgment of the court thereon in the condemnation proceedings, to the effect that the remaining property of the appellants had been damaged by the laying of the street across the same, is *res judicata* of the proposition that benefits would accrue to such property by the improvement of the condemned street. In support of the contention, the appellants rely upon the provisions of the act relating to eminent domain, and the decision of this court in the cases of *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106; *In re Third, Fourth and Fifth Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862, and *In re South Shilshole Place*, 61 Wash. 246, 112 Pac. 228.

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The section of the eminent domain act thought to bar the assessment is section 15 of the act of March 13, 1907 (Laws 1907, pp. 316, 321). The section reads as follows:

"When the ordinance providing for any such improvement provides that compensation therefor shall be paid, in whole or in part, by special assessment upon property benefited, the compensation found by the jury for any land or property taken shall be irrespective of any benefit from the improvement proposed. When such ordinance does not provide for any assessment, in whole or in part, upon property benefited, the compensation found for land or property taken and in all cases the damages found in respect to lands or property not taken, shall be ascertained over and above any local and special benefit arising from such proposed improvement, except as provided in section two of this act as to streets, avenues and boulevards established or widened to a width greater than one hundred and fifty feet; in which class of cases no benefits shall be deducted as to such excess."

This section, we think, does no more than provide for offsetting benefits against damages where damages are claimed to abutting and adjoining property for the taking of property for street purposes or for grading or otherwise improving a street. It does not require that the city shall, where it condemns land for a street, provide for a finished street in that proceeding, and determine once for all the amount of damages or benefits abutting or adjoining property will sustain because of the improvement. On the contrary, we think the city may divide the proceedings into as many steps as the nature of the case may require; that is to say, it can, in one proceeding, lay out the street and condemn the necessary land needed therefor; it can, in another proceeding, grade the street; and, in still another, cause it to be paved; and after this is done, it may regrade and repave it as often as the street requires grading or repaving. Of course, in any one of these proceedings, land cannot be assessed to pay the costs of making the specific improvement, when a jury determines that such land will be damaged by reason of the improvement over and above all benefits accru-

ing to the same. But the rule applies only to the particular improvement in question. One such finding does not bar the right of the city to assess the property for benefits accruing from a subsequent improvement. This is all that the city has done in the matter before us. In the first instance, it condemned the land for the street, and paid the appellants not only for the value of the land, but for all damages that accrued to the remainder of the land by reason of the taking. In the second instance, it graded and planked the street, and it seeks to collect from the appellants' land a proportional share of the benefits the grading and planking of the street cause to accrue to such land. The two proceedings are entirely distinct, and clearly, the one cannot be a bar to the other.

The appellants, however, claim that the question of the cost of improving the street was actually submitted to the jury in the condemnation proceedings, and was taken into consideration by the jury in making up their verdict as to the amount of damages that should be awarded the appellants. But the record as a whole shows that the contention is unfounded. The city attorney may have gone beyond the issues before the jury in propounding questions concerning the amount of benefits that would accrue by the establishment of a street over the land sought to be taken, but there was no actual trial of the issues presented in the present case. As we have said, nothing was shown in that proceeding concerning the plans or costs of the present improvement, hence no verdict could have been founded thereon. Nor did the court in its charge submit any such question to the jury. In the language quoted, the court meant no more than to refer to the taking of the land for street purposes. This is made clear by reference to the remaining part of the charge.

The case of *Schuchard v. Seattle*, *supra*, relied upon by the appellants, does not maintain a doctrine contrary to that here announced. That was a case where the improvement consisted of regrading and repaving certain streets, and the

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question submitted to the jury was whether the property affected by the improvement was damaged in excess of benefits. Subsequently the city attempted to assess certain property as benefited by the improvement, which the jury found had been damaged in excess of benefits. This we held the city could not do, since the verdict of the jury was conclusive of the question. The question there presented was not, therefore, analogous to the question presented in the case at bar, and could be analogous only had the court there held that the awarding of damages in some prior condemnation proceedings barred the right to assess for benefits accruing because of the later improvement. A case more nearly in point on the question presented here is *Levy v. Seattle*, 61 Wash. 540, 112 Pac. 639, which supports the conclusion we have reached.

The other cases cited refer only to the proper measure of damages in an action brought to condemn land for street purposes. They have no relation to the question here suggested.

The judgment is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9619. Department One. December 1, 1911.]

*In Re TWELFTH AVENUE.*¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT DISTRICTS—FIXING BOUNDARIES—APPORTIONMENT OF EXPENSE—REVIEW BY COURTS. The courts will not review the action of eminent domain commissioners in fixing the boundaries of improvement districts or in apportioning all the expenses to the property without charging the general fund of the city, where there is no showing of arbitrary action, fraud, or mistake.

SAME—AMOUNT OF ASSESSMENTS—ACCRUING INTEREST. An assessment for a local improvement may include accumulated interest pending the making of the assessment roll, where the authorities proceeded with diligence in preparing the roll.

¹Reported in 119 Pac. 5.

4—66 WASH.

Appeal from a judgment of the superior court for King county, Main, J., entered February 24, 1911, confirming a special assessment for a local improvement, upon appeal by property owners. Affirmed.

Willett & Oleson, for appellants.

Scott Calkoun and William B. Allison, for respondent.

PARKER, J.—This is an appeal from an order of the superior court for King county, confirming a special assessment made by eminent domain commissioners to pay awards of damages and expenses incurred by the city of Seattle in acquiring and damaging private property for the purpose of improving 12th avenue, and other streets in that city. Appellants are the owners of property against which the assessment is made, and it is contended in their behalf, (1) that the boundaries of the assessment district are so clearly wrong in omitting certain property therefrom that the trial court should have annulled the assessment; and (2) that the general fund of the city should have been charged with a portion of the cost and expenses of acquiring and damaging the private property for the improvement.

The improvement contemplated is the widening and changing of the grades of 12th avenue, from Denny Way south, to Jackson street, a distance of twenty blocks, and the widening and changing of the grades of certain other streets near to or crossing 12th avenue, so that at no point does the improvement extend more than four blocks in an east and west direction. The limits of the assessment district fixed by the commissioners extends north and south and east and west in approximately this proportion. It is insisted by counsel for appellants that the assessment should have extended much farther to the east so as to include property it is claimed will be benefited by the improvement, and that in this respect the boundaries of the district were erroneously fixed by the commissioners. The theory of this

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contention is that the improvement in the grades of the east and west streets will furnish a more advantageous outlet than at present to the business portion of the city from this property which is excluded from the assessment district upon the east. Alleged error in excluding certain other property from the assessment district is rested upon the same theory as to its benefit. No contention is made as to the amount of any assessment upon any particular lot or tract, it being conceded that, if the boundaries of the assessment district are correct, the assessments are properly apportioned upon the several lots and tracts.

There is eminent authority indicating that the fixing of the boundaries of a district for a special assessment purpose by the persons or body possessing that power by virtue of it being so delegated by the legislature, is an act so purely legislative in its character that the courts are excluded from interfering therewith. 1 Cooley, Taxation (8d ed.), 234; Hamilton, Special Assessments, 19; 1 Page & Jones, Taxation by Assessment, 552, 553. We are not, however, required to adopt this view, without qualification, in order to sustain the acts of the eminent domain commissioners in this case. Applying the rule heretofore adopted by this court where the correctness of the amount of the assessment upon the various lots and tracts are involved, a review of the evidence in this case convinces us that there is here no such showing of arbitrary action, fraud, or mistake on the part of the commissioners in fixing the boundary of this district as calls for interference therewith by the courts, even conceding that that may become a judicial question. We see nothing here involved except a difference of honest opinion as to where the boundaries of this assessment district should be. Clearly that is not sufficient to warrant an interference with the judgment of the commissioners in that respect. *In re Seattle*, 45 Wash. 63, 89 Pac. 156; *In re Seattle*, 50 Wash. 402, 97 Pac. 444.

The contention that a portion of this expense should

have been charged to the general fund of the city because of the general public benefit can be answered in the same way. *In re West Lake Avenue*, 40 Wash. 144, 82 Pac. 279.

Some contention is made that the total amount of the assessment was unduly enhanced by a charge for accumulated interest pending the making of the assessment roll. It is manifest that, from the time of the rendition of the verdict and judgment awarding damages to the owners of property taken or damaged, until the money can be realized upon the assessment for payment of such damages, interest will necessarily accumulate upon the damage awards. The complaint here is that there was undue delay in making up the assessment roll, resulting in accumulation of interest charged against the property to be assessed which could have been avoided by diligence on the part of the city and commissioners in making up the roll. The evidence convinces us that the commissioners and the city moved as promptly as circumstances would permit in preparing the assessment roll. Had there been undue delay in this respect there would be some ground for this contention. We agree with the learned trial judge that no reason is shown for interference with this assessment by the courts. The order confirming the assessment roll is therefore affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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Statement of Case.

[No. 9699. Department One. December 1, 1911.]

PAUL STEENSTRUP, *Respondent*, v. TOLEDO FOUNDRY &
MACHINE COMPANY, *Appellant*.¹

CONTINUANCE—ABSENCE OF COUNSEL—DISCRETION. It is not an abuse of discretion to refuse to grant a continuance upon the ground of the absence of nonresident counsel for the defendant, who was familiar with the facts and expected to try the case, but was sick at his home in another state and could not be present at the trial, resident counsel claiming that he was not in a position to intelligently conduct the defense; such a continuance being a matter of grace.

CONTINUANCE—GROUNDS—FAILURE TO ANSWER INTERROGATORIES. A continuance need not be granted for failure of the plaintiff to answer interrogatories, where they were not served until six months after the commencement of the action, and at a time when the case had been or was about to be set for trial, and a motion to strike the interrogatories was pending, with no effort made to dispose of the motion.

APPEARANCE—EFFECT—PROCESS—WAIVER OF SUMMONS. An answer on the merits by a foreign corporation, with a cross-complaint seeking a money judgment, is a general appearance that waives any error in denying defendant's motion to quash service of a summons.

EVIDENCE—WRITTEN CONTRACT—ADMISSIBILITY OF PAROL EVIDENCE—CONSTRUCTION BY PARTIES—CONTEMPORANEOUS AGREEMENT. A written contract for the sale of a steam shovel f. o. b. at Toledo, Ohio, to be set up, demonstrated, and guaranteed, at Seattle, Washington, which provided that the buyer was to pay all expenses of unloading, installing and operating the shovel for demonstration, except the expenses of an engineer, and that if the shovel was not up to guarantee, the seller would refund whatever payment it had received, is not clear and certain as to which party was to pay the cost of freight if the shovel was not as guaranteed; and accordingly it is admissible to show that, before the parties signed the contract, the seller wrote a letter to its agents, which was shown to the buyer, representing that the freight charges would be refunded in case the shovel was not as guaranteed.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 22, 1911, upon find-

¹Reported in 119 Pac. 16.

ings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Affirmed.

Wesley J. Wuerfel (*James T. Lawler*, of counsel), for appellant.

Gill, Hoyt & Frye and *R. L. Blewett*, for respondent.

PARKER, J.—This is an action to recover the sum of \$1,123.15, paid by the plaintiff for freight charges upon a steam shovel which was shipped from Toledo, Ohio, to Seattle, in pursuance of a contract for the sale thereof from the defendant to the plaintiff. A trial resulted in findings and judgment in favor of the plaintiff, and against the defendant for that sum. The defendant has appealed.

It is first contended that the trial court erred in denying appellant's motion for a continuance of the trial. Appellant is a corporation of Toledo, Ohio. This action was commenced in May, 1910. The trial was set for December 16, 1910. Appellant has been, at all times since June 10, 1910, represented in the case by James T. Lawler, a resident attorney of Seattle, and also by Wesley J. Wuerfel, an attorney of Ohio, residing at Toledo, in that state, who is not a member of the bar of this state, though it may be conceded that he may be granted the privilege of appearing and practicing in our courts under Rem. & Bal. Code, § 120. On December 16, 1910, Mr. Lawler, as attorney for appellant, moved the court for a continuance of the trial, supported by his affidavit, stating in substance, that Mr. Wuerfel, as one of the attorneys for appellant, had the principal charge of the case, and was the only attorney in the case who was acquainted with the facts and prepared to act for appellant upon the trial; that he, Lawler, did not have such knowledge of the facts as to be in a position to intelligently conduct the defense; that it was understood between him and Mr. Wuerfel that Mr. Wuerfel would try the case on behalf of appellant; that technical matters were involved in refer-

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ence to steam shovels with which he was not familiar, but with which Mr. Wuerfel was familiar; that Mr. Wuerfel was then sick at his home at Toledo, and unable to be present at the time the trial was then set for; and that certain interrogatories which had been propounded and served upon respondent had not been answered.

So far as this motion rests upon the absence of Mr. Wuerfel from the state, we think there was no abuse of discretion on the part of the trial court in denying the motion. While our law contemplates extending the courtesy of practicing in our courts to attorneys of other states, we do not think that our courts are thereby required to delay the trial of causes to await the convenience of such attorneys to be present and participate therein. There may be circumstances under which a trial court might be justified in delaying a trial for such a purpose, but for this court to say that the refusal of a trial court to do so would be an abuse of its discretion would require a showing of far greater necessity for the presence of such nonresident attorney than is made in this case. Indeed, it may well be doubted that a party to an action has any right to be represented by nonresident counsel except when such counsel is present in the state when the action is pending at such times as the presence of counsel is required in the action. To say that the enforced absence of nonresident counsel gives cause for continuance under similar circumstances as the enforced absence of resident counsel, would render possible delays such as the law never contemplated. The disposition of the vast amount of litigation pressed upon the attention of our courts cannot be subjected to such contingencies except in the discretion of the trial court. We view a continuance under such circumstances as little else than a matter of grace. We may add that in this case the appellant's cause was apparently well conducted by Mr. Lawler, notwithstanding his opinion that he was unprepared.

Nor do we think that the failure of respondent to answer

the interrogatories was a cause for continuance, under the circumstances. As we have seen, the case was commenced in May, 1910. The interrogatories were served upon respondent on November 28, 1910, six months after the commencement of the action, and at a time when the case had either been set for trial or was about to be set for trial. Respondent moved to strike the interrogatories on the ground of delay in serving them, and also on the ground of their irrelevancy to the issues involved. Appellant did not seek a ruling of the court upon this motion before making application for a continuance, nor before the trial. Respondent was present at the trial and testified, and appellant's counsel had there every opportunity to examine him. We conclude there was no error in the denial of the motion for continuance.

It is next contended that the court erred in denying appellant's motion to quash the service of the summons. The only answer that this contention requires, is the fact that appellant thereafter answered upon the merits, and also filed with its answer a cross-complaint seeking a money judgment against respondent upon an alleged cause of action growing out of the same transaction upon which appellant based his claim. This was clearly a general appearance by which appellant waived whatever defects there may have been in the service of the summons upon it. *Walters v. Field*, 29 Wash. 558, 70 Pac. 66; *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202; *Calhoun v. Nelson*, 47 Wash. 617, 92 Pac. 448; *Springfield Shingle Co. v. Edgcomb Mill Co.*, 52 Wash. 620, 101 Pac. 233.

It is next contended that the trial court erroneously admitted and considered certain evidence which it is insisted by counsel for appellant was in contradiction of the terms of the written contract of sale of the steam shovel, upon which contract alone they claimed the rights of the parties here involved depend. The terms of that contract, so far as we need notice them here, are as follows:

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"Toledo, Ohio, March 11th, 1910.

"This agreement, made in duplicate, witnesseth the undertaking upon the terms and conditions as in this conditional sale contract set forth, of the delivery of one class 2 Victor steam shovel, No. 506, from the Toledo Foundry & Machine Company, of Toledo, Ohio, hereinafter styled the seller, into the possession of Paul Steenstrup of Seattle, Washington, doing business and known as Paul Steenstrup, contractor, hereinafter called the buyer.

"This writing contains all and singular the agreements and conditions, and warranties, between the parties hereto.

"Said machine is to be shipped f. o. b. Toledo, Ohio, on or about the 12th day of March, 1910; and upon receipt of wire notice (which buyer hereby agrees to send to said seller immediately upon arrival of said shovel at destination) or as soon thereafter as possible, seller agrees to send a competent steam shovel engineer to superintend the unloading and installing, and to operate the engines of said steam shovel to demonstrate same to be in accordance herewith; said engineer to be entirely at the expense of seller for a period of not exceeding 15 days of 10 hours each; but should it be found necessary for him to remain longer, buyer hereby agrees to pay seller \$6.00 per day for each day of such overtime. All other expenses of unloading, installing and operating of said steam shovel for demonstration, buyer hereby agrees to bear.

"The seller guarantees said machine to be as set forth on page six of catalogue No. 1, issued by seller, and as per specifications hereto attached, which are made part of this contract.

"If after said demonstration said steam shovel is in accordance herewith, buyer hereby agrees to at once accept same and relieve seller of further expenses by signing and delivering to seller's engineer a formal acceptance of the shovel in the following terms: 'Received from the Toledo Foundry & Machine Company, of Toledo, Ohio, the possession of steam shovel No. 506 in full satisfaction,' whereupon the liability of the seller shall cease and determine; and to sign and deliver to the seller the notes as herein provided, and the possession of said shovel will not be acquired by buyer until the delivery to the engineer of said acceptance and signed notes.

"If, during said demonstration any parts of said steam shovel prove defective or any changes be necessary, seller shall have a reasonable length of time to replace such parts or make such changes as may be found necessary. If seller then fails to demonstrate the guarantee, it agrees to remove said steam shovel at its expense and to refund whatever portion of payment it has received hereunder, and buyer hereby expressly waives any right or claim for possible damages or expense."

This contract was signed by respondent on March 11, 1910, the date it bears, at Seattle; and was signed by appellant on March 16, 1910, at Toledo, Ohio. It was prepared by appellant at Toledo, and sent to Hadley & Rinker, of Seattle, who were acting as agents for appellant in the sale. Negotiations between respondent and Hadley & Rinker had been carried on for some time looking to this sale, when on March 7, 1910, appellant wrote to Hadley & Rinker a letter enclosing this form of contract, in which letter it is stated:

"Your customers will run no risk whatever; if our shovels do not come up to the guarantee, they can be rejected and we will refund all payment made to us and the freight paid by them.

"Our Victor steam shovels are not an experiment, and are not excelled, we believe, by any other make.

"We beg to confirm the telegram we sent you this p. m. as follows: 'Steenstrup option fifty-five ton shovel still good on terms your letter January seventeenth.'

"In this connection we may say that we are building these shovels constantly and are in shape to ship promptly on receipt of order. We are sure that your customers will be highly pleased with the Victor, as it is a shovel that will do the work on a minimum expense per yardage.

"We enclose herewith a blank form of the contract under which we deliver the shovels and which we will execute upon receiving an order from you, based on the terms and conditions therein set forth."

This letter was received at Seattle by Hadley & Rinker, with the form of contract enclosed as stated, about March

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10th or 11th, 1910. The letter was then shown to respondent by Hadley & Rinker, and the statement therein as to refunding freight charges upon failure of the guarantee particularly called to respondent's attention, with the assurance on the part of Hadley & Rinker that the freight charges would be refunded to respondent in the event the steam shovel should not come up to the guarantee. Thereupon the contract was signed by respondent and returned by Hadley & Rinker to appellant at Toledo, when it was signed by appellant on March 16, 1910.

The shovel was shipped from Toledo, arriving at Seattle, April 5, 1910, when respondent paid the \$1,123.15 freight charges thereon. The demonstration of the shovel was then proceeded with under the superintendence of a steam shovel engineer in pursuance of the contract. This demonstration failed to show that the shovel was as guaranteed, notwithstanding ample time was given therefor, as well as for curing defects in the shovel. Thereupon respondent rejected the shovel and commenced this action to recover the amount of the freight charges he had paid thereon. The letter of March 7th from appellant to their agents Hadley & Rinker, the showing of that letter by them to respondent, and the conversation then occurring between them touching the refunding of freight charges as stated in the letter, constitute the evidence admitted and considered by the court which is insisted by counsel for appellant to be inadmissible, in view of the provisions of the written contract of sale.

The contention is that the provisions of this written contract constitute the sole evidence by which to determine appellant's liability to refund the freight charges to respondent. If the written contract was clear and certain upon the question as to which of the parties should be responsible for the freight charges, in the event of the failure of the sale because of the failure of the guarantee, there would be merit in this contention. It seems to us, however, that the written contract is not so certain in this particular as to exclude con-

temporaneous acts and conversations of the parties putting their own construction upon the terms of the written contract, or evidence of a separate contract concerning the freight, such as we find in this letter and the contemporaneous conversation, which clearly indicates that respondent was to have the freight charges refunded to him by appellant in the event of the failure of the guarantee and his rejection of the shovel on that account. It may well be argued that the "expense" waived by respondent, refers only to the "expense of unloading, installing and operating" mentioned in the contract as being assumed by respondent. It is true that the shovel was to be sold f. o. b. at Toledo, and this of course contemplated payment of freight by respondent in case of the sale being consummated. We think it does not necessarily follow that he was to lose the freight in case there was no consummation of the sale through the fault of appellant. Whether we regard the showing of this letter by Hadley & Rinker to respondent and the contemporaneous conversation, as creating a separate contract from the written sale contract, or as a contemporaneous construction of the sale contract which we regard as uncertain in this particular, we think this evidence was admissible and sufficient to base respondent's recovery upon, in the event he was, under the terms of the sale contract, justified in rejecting the shovel.

It is finally contended that the evidence is insufficient to sustain the findings and judgment. Our review of the evidence convinces us that it was ample to warrant the conclusion that the shovel was proven so defective as to wholly fail to meet the requirements of the guarantee, and that appellant did not remedy the defects in the shovel, though ample time was given for that purpose. We deem it unnecessary to review the evidence in detail here. We conclude that the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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[No. 9595. Department One. December 2, 1911.]

T. Y. RIPPEY *et al.*, Respondents, v. BENJAMIN F. HARRISON
et al., Appellants.¹

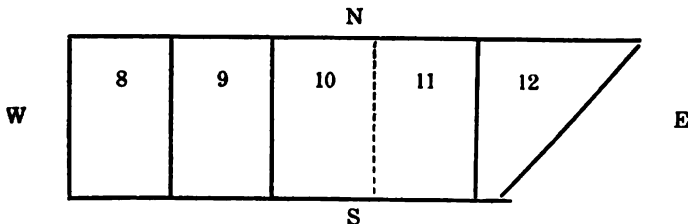
BOUNDARIES—EVIDENCE TO ESTABLISH—SUFFICIENCY—ADVERSE POSSESSION—ESTOPPEL. Upon a dispute as to the true location of a line between two lots, plaintiffs failed to sustain the burden of proof and are estopped to assert title to a strip 2.44 feet wide outside of their fence, where it appears that they built a fence upon what they supposed was the true line and maintained the same and made no claim to the additional strip for thirteen years, and defendants bought the adjoining lot supposing the fence to be on the line and held possession for more than ten years; there also being evidence on the part of defendants that the fence was set on the line marked by the original stakes, and was pointed out as the line by the common grantor (PARKER, J., dissenting in part).

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered December 21, 1910, upon findings in favor of the plaintiffs, in an action to quiet title, after a trial on the merits. Reversed.

Bryan & Ingle, for appellants.

Jas. W. Carr, for respondents.

DUNBAR, C. J.—The respondents brought this action to quiet title to a certain strip of land in dispute. The following map will show substantially the location of the land:



There is some contention by the respondents that this plat does not show the true line between lots 11 and 12; but,

¹Reported in 119 Pac. 178.

with the view we take of the case, this is not material. The respondents were the owners of lots 8, 9, and 10, and the appellants of lots 11 and 12. The matter in dispute is the correct line between lots 10 and 11. The respondents purchased the land on March 4, 1898, and had a contract to purchase prior to said date. Respondents, soon after purchasing the property, and thirteen years preceding the time of the trial in the court below, took possession of said property and built a line fence on what they then believed to be the east boundary line of lot 10. That fence has stood there since, and is still standing as originally located. This fence is 2.44 feet west of what respondents now contend is the true east boundary of said lot 10. The appellants' contention is that the fence is on the correct boundary line, and they base their claim upon the propositions, (1) that the fence was constructed upon the original survey stakes and according to the first survey made, and that the first survey governs regardless of the same being correct or incorrect; and (2) that they are entitled to said strip by reason of adverse possession of same for a period of greater than ten years. The trial court held that the true line was as contended for by respondents, and the prayer of the respondents was granted, and judgment entered quieting the title to the same.

We are unable to agree with the conclusion reached by the trial court, although the case is not without difficulty by reason of the indefinite and unsatisfactory character of the testimony. We may admit the general rule that monuments control courses and distances; but there are no original monuments discovered in this case, and the object of a survey when a line is in dispute is, not to determine where the original location ought to have been, but where it actually was; because a purchaser has a right to be protected in the land which he buys with reference to the original monuments or locations, whether they were right or wrong.

The court, in reviewing the testimony, said: "There is

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nothing to show that there were any stakes to mark the line when Mr. Eriksen and Mr. Rippey made this fence." It is true that neither Mr. Eriksen nor Mr. Rippey stated that there were any stakes to mark the line, although they both stated that they thought they were building the fence on the line, but Mr. Jensen, the grantor of the appellants, who was the owner of lots 11 and 12 from 1898 to the date of the deed from him to Harrison; and who purchased the lots from Bremer, the respondents' grantor, testified that he had found a stake on the west boundary of lot 11, and a hub in the alley on the east side, before the building of the fence, and that he knew that the stakes were surveyor's stakes; and further testified as follows:

"Q. Now, with reference to the fence that was built later, how did that correspond with the west boundary of lot 11 according to these stakes? A. The stakes were there at the time the post holes were dug. Q. Then the holes were made and the fence built on the line? A. Yes. Q. You never had any talk after that about the fence being on the line? A. No. Q. That was the line according to the stakes? A. That was always the line. . . . Q. Mr. Jensen, did you at the time you bought the lots get any abstract? A. Yes, I did."

And it appears from the testimony that the abstract which Jensen got and which was transferred to the appellants showed the line to be as contended for by the appellants. Mr. Jensen also testified that he measured the distance with a tape, and that the line as indicated by the fence was pointed out to him as the line by Bremer, the common grantor.

The testimony of the surveyors failed to throw any light upon the merits of the case, but it appears from the record that, thirteen years prior to the purchase of these lots by the appellants, respondents had established the line between lots 10 and 11 which they thought to be the true line, and which, according to the testimony of Jensen, followed the line of the surveyor's stakes by the erection of a fence. This in a sense was a monument which they recognized, and which

they held out as the true line; and while a man is not compelled to fence in all his land, yet under the circumstances shown by the testimony, their action led the appellants to believe that the fence was the line, and they bought with that understanding and respondents should be estopped from now dispossessing innocent purchasers, even though they have proved—which they have not to our satisfaction—that the true line is as they claim it to be. They testify that, during all these years, they never had made any claim to this small strip of land to Mr. Jensen, who owned the land adjoining them. If their theory is correct, according to the testimony they have 2.44 feet more of land than they thought they were purchasing. The burden is upon the respondents, the plaintiffs in the case, to establish their claim, and we think they have not done so.

The judgment will be reversed, with instructions to dismiss the action.

GOSE, MOUNT, and FULLERTON, JJ., concur.

PARKER, J. (concurring)—I concur in the result, but do not concur in the view that appellants are estopped by any acts amounting to a practical location upon the ground of the line between lots 10 and 11. Having the burden of proof, they have simply failed to prove the true location of that line; and for that reason they cannot dispossess respondents.

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[No. 9707. Department Two. December 2, 1911.]

AUGUST A. JOHNSON, *Respondent*, v. ANNA E. JOHNSON
et al., *Appellants*.¹

PLEADINGS—DEMURRER—WAIVER OF OBJECTIONS. Error in overruling a demurrer to a complaint is waived by answer and trial on the merits.

EXECUTION—SALE—VACATION—FRAUD—EVIDENCE—SUFFICIENCY—PERSONAL NOTICE. An execution sale will not be set aside two years after the sale on the allegations of want of personal notice and fraud, where it appears that the judgment debtor had notice that the plaintiff intended to and would issue execution and sell the property if the judgment was not paid, and the altercation which took place shows that there could have been no deception; personal notice of the sale not being required by Rem. & Bal. Code, § 582.

EXECUTION—SALE—VACATION—INADEQUACY OF PRICE. An execution sale of property of the value of \$1,000, to satisfy a judgment of \$195.50, will not be set aside on the sole ground of inadequacy of price, the sale having been made at public auction on due notice and no fiduciary relation existing or circumstances proven showing unfairness.

EXECUTION—SALE—PURCHASE BY ATTORNEY. The attorney for the adversary may bid in property of the judgment debtor upon execution sale the same as though he were a stranger.

Appeal from a judgment of the superior court for King county, Hinkle, J., entered April 6, 1911, upon findings in favor of the plaintiff, in an action to set aside an execution sale. Reversed.

George B. Cole, for appellants.

F. B. Carpenter, for respondent.

DUNBAR, C. J.—Respondent August A. Johnson and appellant Anna E. Johnson were formerly husband and wife, owned certain community property in King county, Washington, among which was lot 10, block 30, of Gilman Park, the land in controversy. The appellant Johnson brought

¹Reported in 119 Pac. 22.

an action for divorce against the respondent Johnson, and a decree of divorce was granted in the superior court of King county, Washington. A division of property was made by the court, and the said lot 10 was awarded to the respondent. There was also a judgment for \$100 attorney's fees, and costs amounting to \$40, entered against respondent Johnson. This judgment was not paid, and on April 22, 1908, the sheriff of King county levied on said block 10, and sold it on July 6, 1908, to appellant Cole, for \$154.80.

During all the time between the awarding of the judgment against the respondent on January 27, 1908, and March 10, 1910, the said lot was rented by respondent to one Charles Hegstrom, and on March 10, 1910, appellant Cole served a notice of ownership and to pay rent, on said Hegstrom; and on February 14, 1911, this action was brought by respondent Johnson, asking that the sale of said lot 10 be decreed fraudulent and void, and that said sale be set aside and vacated; alleging a decree of divorce, the awarding of lot 10 to the respondent, the renting of the same to Hegstrom; that the sale was fraudulently procured by the appellant Cole; that no notice of sale had been served upon him, and that he did not know that any levy was ever made on said lot until about December 10, 1910; alleging publication in an obscure newspaper; that the appellant Cole was in possession of the lot and claimed the same as his property and the property of his wife; and other matters not necessary to be mentioned.

The appellants denied the material allegations of the complaint. The respondent replied to some immaterial affirmative matters in the answer, and the case was tried before Honorable J. D. Hinkle, a visiting judge in King county, with the result that the sale of lot 10, block 30, Gilman Park, King county, Washington, made by the sheriff of King county on the 6th day of June, 1908, was declared null and void, set aside, and vacated. It was also adjudged that the plaintiff, the respondent in this case, should recover the sum

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of \$25 for the rental value of said premises from the time possession was taken of it by appellant Cole up to the time of the trial. From this judgment this appeal is taken.

Inasmuch as the defendants answered and proceeded to the trial of the cause on the merits, we will not discuss the first assignment, viz., that the court erred in overruling the demurrer to the complaint. But the whole record convinces us that the court did err in adjudging that the deed to appellant Cole should be set aside, cancelled, and annulled. This case, it seems to us, falls squarely within the rule announced in *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164, excepting that that case was free from any question of estoppel on the part of the plaintiff, the action for relief having been brought before the confirmation of sale in the form of objections to the confirmation; and here there is an attack upon the judgment of confirmation and of sale more than two years and a half after sale, and one year after the deed had issued to the appellant. It is true that respondent testifies that he was not served with notice of the sale, and that notice was not given according to law, but this allegation he fails to substantiate by proof. He was not entitled under the law to personal notice. Laws 1903, p. 381, § 1; Rem. & Bal. Code, § 582. It fairly appears from the testimony that constructive notice was given, and so far as the personal notice is concerned, the appellant testifies in the most positive manner that, shortly after the judgment was rendered, he told the respondent that the judgment was a lien on his property, and that he must satisfy the judgment or that he (appellant Cole) would issue an execution and sell his property, and that the respondent defied him and threatened him with disbarment proceedings and other dire punishment; that the conversation was in appellant's office; that the altercation became so violent that the appellant ordered respondent out of his office, and that a physical encounter was narrowly averted. This is denied by the respondent, but the appellant's testimony is in substance corroborated

by witness E. E. Peck, who testified that he had explained to respondent that the judgment was a lien upon his real estate; that Cole had intimated to him that he would issue an execution and sell the property, and that he had better look after it, and that respondent had answered that if Cole tried a thing of that kind he would fix him. There was some attempt to impugn the motives of Mr. Peck, but it was an absolute failure. Mr. Peck had been attorney for respondent in the divorce proceedings, but this conversation he had with him was after he had settled up with him, and was evidently a good-natured attempt on his part to save his former client from unnecessary costs. This proof of personal notice to respondent is legally immaterial, since he was a party to the action and knew of the judgment and of its force and effect. But it is important as showing the lack of conspiracy, or of any hidden or ulterior action on the part of the appellant, looking to the deception or overreaching of the respondent in the matter of the sale.

So that there is nothing left in this case but the inadequacy of the purchase price. The amount bid on the property by Cole was \$195.50. The testimony on the part of the respondent was that the property was worth from \$1,700 to \$1,800; on the part of the witnesses for the appellant, that it was worth about \$1,000, the appellant himself, at the time of the trial, offering to take \$1,000 for it. But while the amount bid was disproportionate, it is the general rule that inadequacy of price alone will not justify the setting aside of a judgment sale unless the disparity is so gross as to shock the conscience, and particularly where the estate is sold at public auction on legal notice and where no fiduciary relation exists.

In discussing the inability of attorneys to purchase property, and in noticing cases discussing that proposition, it was said by this court, in *Merritt v. Graves, supra*:

"But the prohibition in question has no application to a case of this kind. The appellant was the attorney for the

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plaintiff in the original action, but she has not appealed and is not complaining. No relation of trust or confidence existed between the appellant and the respondent, and appellant was under no legal or moral obligation to protect him or his rights. The plaintiff in the action might have become the purchaser at the sale. . . . True, the attorney occupied a position of trust and confidence towards his client and could not become the purchaser at the sale against her will; if she did not consent to the purchase, she might by acting promptly claim the benefit of the purchase or oppose confirmation, but the matter was one solely between her and her attorney, and a stranger will not be heard to complain."

And so in this case, there was no fiduciary relation whatever existing between respondent and attorney Cole. He was attorney for respondent's opponent in the divorce proceeding. He was in no way entrusted with respondent's interests. On the contrary, his duty to his client placed him rather in the position of an adversary, and it must have been so understood; and he had the same right that any stranger would have to bid on the estate, not of his client but of the respondent, in any open market. Nothing that is said in *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. 1105, militates against this rule. There the rule in relation to buying of estates by attorneys was applied, and it was held that a city attorney could not bid in property at a public sale conducted by him and assert equitable defenses against the owner, because he was charged as a trustee as well for the owner of the property charged with the lien of a specific assessment as for the city, and was bound to perform his full duty to each; and that, in such case, slight attending circumstances indicating unfairness were sufficient to sustain the discretion of the court in setting aside a sale for a great inadequacy of price. This opinion voices almost universal authority, and was based upon justice and fair dealing. But in this case, there being no fiduciary relation at any time,

and no circumstances proven tending to show unfairness, inadequacy of the price alone is not sufficient to annul the sale.

The judgment is reversed, with instructions to dismiss the action.

CROW, ELLIS, MORRIS, and CHADWICK, JJ., concur.

[No. 9810. Department Two. December 2, 1911.]

LOUIS KNUDSEN, *Appellant*, v. MOE BROTHERS,
INCORPORATED, *Respondent*.¹

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS—EVIDENCE—QUESTION FOR JURY. In an action for personal injuries sustained by a loader of logs through the fall of a log from the load, the negligence of the master and contributory negligence are for the jury, where it appears that plaintiff loaded a car to its capacity, but the foreman ordered another log put on, to which the plaintiff at first objected because it would not stay on, but finally deferred to the foreman's judgment, putting on another log in the presence of the foreman, which afterwards fell off and struck the plaintiff while he was setting a brake in the discharge of his duties.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered March 17, 1911, in favor of the defendant, dismissing an action for personal injuries sustained through the fall of a log from a car, after a trial before the court and a jury. Reversed.

Martin J. Lund, for appellant.

Peterson & Macbride, for respondent.

CROW, J.—Action by Louis Knudsen against Moe Brothers, Incorporated, a corporation, to recover damages for personal injuries. At the close of plaintiff's evidence, the defendant's challenge to its sufficiency was sustained, and the action was dismissed. The plaintiff has appealed.

¹Reported in 119 Pac. 27.

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The only question presented is whether the trial judge erred in sustaining respondent's challenge and dismissing the action. From the evidence the following facts appear: Respondent corporation is the owner of a logging camp, in Kitsap county, together with a railroad, logging trucks, and machinery which it uses in conducting a logging business. Appellant was employed as a member of respondent's loading crew. On March 25, 1909, with the assistance of other employees, he loaded one set of trucks, by placing three logs, two large and one small, in the first or lower tier, the small log in the center, and by also placing one large log in the second or upper tier. Appellant regarded the car as then completely and safely loaded.

While the employees were waiting for a locomotive to remove the trucks, one Chris Moe, respondent's foreman, ordered appellant to place another log on the load. To this order appellant objected, contending an additional log might not remain when the trucks were moved. The foreman repeated the order, insisting there was plenty of room. Thereupon appellant, deferring to his superior judgment, with the assistance of other employees and in the presence of the foreman, placed another log on the car as securely as possible. After this had been done, the locomotive arrived and, with the loaded trucks, proceeded to the main track where the truck was to be left on a slight grade. To hold it on the grade, it was necessary to set the brake by means of a brake wheel, located at one side of the truck. It was appellant's duty to set the brake. While he was thus engaged, the last log which had been loaded, fell from the truck and injured him. Appellant in part testified as follows:

"Q. Tell the jury in your own way how it happened. A. I was there as a loader and I had the load finished in my own judgment; I thought it was a load, and I was there standing waiting for the loco. Q. You mean the locomotive? A. Yes; I was waiting for it to come up and take the load away, and while I was standing there waiting Mr. Chris Moe came up and told me I had room for another log on the load, and I

told him I did not think any more would stay on, and he said 'Yes; put another one on and it will stay,' and so I thought he knew better than I did, and that I had better put it on because he knew more than I did, had more experience, and I put it on, and I tried to get the crew to bring me the smallest log they could find, and they brought me a broken cedar log that was split, a flat one, and I put it on. . . . Q. And while you were doing the work, where was Mr. Chris Moe? A. He was there standing by the landing, and the locomotive came up and hitched onto the load, and I went on the locomotive and Chris Moe and Andrew Moe were on the locomotive, too, and I rode down to the switch, and when we came down to the switch I turned the switch and shoved it on the main line, and there was an empty truck between the load and the locomotive, and I went between that empty truck and the load till it was ready to stop, and I went and set the brakes, and as I grabbed the brake the log came off and struck me. . . . Q. Whose duty was it at that time to set the brakes? A. It was mine. There was nobody else there to set them. Q. What, if anything, was said to you about setting the brakes? A. Andrew Moe told me to set the brake. Q. And what was the nature of the track as to whether it was level? A. It was a little lower, so that it could not stay unless the brake was set; there was a little hill there."

The appellant thus yielded his judgment to that of the foreman, and obeyed his instructions, thinking he had the most experience and knew best. The evidence shows appellant thought the car was sufficiently and safely loaded; that the order of the foreman was then given; that in obedience thereto appellant placed another log in the manner he thought best; that he then believed it would remain, but that it fell and injured him. The questions presented are: Whether respondent's foreman was negligent in ordering appellant to place another log on the trucks; whether the resulting danger was so imminent and certain that a reasonably prudent man in the exercise of caution would not increase the load; and whether appellant was negligent in obeying the order. Under the evidence these questions were for the jury, notwithstanding the facts that the additional log was loaded

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by appellant and another employee without assistance or further instruction from the foreman, and that the appellant thought it would remain. Appellant abandoned his former opinion, the result of his own judgment, in deference to the experience and knowledge of the foreman, who was his superior and authorized to employ and discharge the men. As an employee, it was appellant's duty to obey the foreman's orders, unless they were so manifestly dangerous that a prudent man in the exercise of due caution would refuse to obey. A servant's obedience to the master's orders is an absolute necessity to the successful conduct of any industrial occupation. His refusal might deprive him of employment and means of livelihood. Ordinarily a servant yields his judgment to the superior judgment and discretion of the master. If he does, and is injured by reason of his obedience to the master's orders, it will ordinarily become a question for determination by the jury, in such an action as this, whether the danger of obeying the order was so imminent and hazardous as to charge the servant with contributory negligence and preclude him from recovering damages.

In *Van Duzen Gas & Gasoline Engine Co. v. Schelies*, 61 Ohio St. 298, 810, 53 N. E. 998, the court well said:

"There is much reason in the rule that allows a favorable construction to be placed on the act of the servant done in obedience to the orders of his superior, though involving danger. Obedience to orders given by a master becomes a habit with the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so, and without such obedience the business of the master could not be successfully conducted. It is then both reasonable and proper that the master should be held to a reasonable responsibility for what he orders his servants to do; and the conduct of a servant in obeying an order, under such circumstances, should not be too closely criticized by courts in administering the law. Whilst the law will not excuse the servant, where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence and care would, under the circumstances, have obeyed the order,

although involving danger. A servant has the right, and is expected, to rely somewhat on the superior knowledge and skill of one placed in authority over him."

In *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900, an action for personal injuries, the plaintiff was on an upright scaffold held by braces. A portion of the braces had been removed. The foreman ordered plaintiff to remove another brace, which he did. Plaintiff then attempted to leave the scaffold by passing through a window, when the scaffold fell and threw him to the ground. The foreman's order was the negligence charged. The plaintiff recovered damages, and the only question presented on the appeal was whether the danger was so apparent and imminent that a man of ordinary prudence and intelligence would have refused to obey the foreman's order. Upon this question, after citing numerous authorities, we said:

"The master of course is not now estopped to claim that the act of the servant was foolhardy and reckless, but, in view of his previous command, such a defense should be viewed with some suspicion and scrutinized with care. It is reasonable to assume that neither the appellant nor the foreman deemed the act overhazardous at the time, and evidently the jury did not so consider it. It seems to us that reasonable minds might well differ as to the danger that might result from the act which the appellant was directed to perform, and in such cases the jury's verdict is conclusive on the court, in so far as its right to direct a judgment is concerned."

The language quoted is especially pertinent to the facts now before us. From the evidence we cannot say, in view of the order of the foreman, that appellant was so foolhardy and reckless in loading another log that he must be held guilty of contributory negligence as a matter of law; nor can we say the respondent was not guilty of the negligence charged against it. These questions were issues of fact for the jury.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., ELLIS, and MORRIS, JJ., concur.

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[No. 9827. Department Two. December 2, 1911.]

GILBERT KING, *a Minor, by his Guardian etc., Respondent*,
v. PAGE LUMBER COMPANY, *Appellant*.¹

TRIAL—MOTION FOR NONSUIT—PROVINCE OF COURT. Upon a motion for a nonsuit, the evidence must be construed most favorably to the plaintiff.

MASTER AND SERVANT—NEGLIGENCE—FAILURE TO INSTRUCT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The master's negligence and the contributory negligence of the plaintiff are for the jury, where plaintiff was set to work as a dogger on a saw carriage without any previous experience or instructions, and was injured through erroneously setting a dog and attempting to reset it as the sawyer suddenly started the log through the saw when plaintiff was near the saw.

MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL. A sawyer in charge of a saw crew is not a fellow servant of a dogger on the carriage, but a vice principal, as to the nondelegable duties of the master with respect to starting the machinery and giving warning to those in danger of injury therefrom.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$6,900, reduced by the trial judge to \$4,500, will not be held excessive, where the plaintiff, a young man twenty years of age, lost all of the first three fingers of his right hand, and the fourth finger was injured and rendered useless.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered March 21, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover for personal injuries sustained by an employee in a mill. Affirmed.

James B. Murphy, for appellant.

H. G. & Dix H. Rowland and Davis & Neal, for respondent.

CROW, J.—Action by Gilbert King, a minor, by Mary King, his guardian *ad litem*, against Page Lumber Company, a corporation, to recover damages for personal injuries. From

¹Reported in 119 Pac. 180.

a verdict and judgment in plaintiff's favor, the defendant has appealed.

Appellant contends the trial judge erred in denying its motion for nonsuit and a directed verdict. In presenting its motions, appellant contended no negligence upon its part had been shown; that respondent was guilty of contributory negligence; that he assumed the risk, and that if any negligence on the part of any person other than respondent was shown, such negligence was that of respondent's fellow servant. On July 28, 1910, appellant owned and operated a sawmill equipped with machinery, including a saw carriage, about forty feet in length and ten feet in width, upon which logs were placed for sawing. Upon this carriage were three blocks against which the logs rested when about to be sawed. In connection with each block was a dog, a mechanical appliance designed to fasten and securely hold the log against the blocks. This dogging apparatus consisted of an upright iron bar, about three and a half feet long, one inch thick, and three inches wide, which curved back towards the east side of the carriage and away from the west side where the saw was operated and the sawyer stood. In the upright bar were holes in which the dog, an appliance used for holding the log, could be adjusted. In connection with each bar and dog was a lever by which the dog could be drawn down and firmly set into the log. This dogging apparatus was operated by an employee known as a dogger, who controlled the dog with one hand and the lever with the other. While performing his work the dogger stood on the east side of the carriage opposite the sawyer, who with a lever operated and controlled the carriage. When a log had been securely dogged, the sawyer caused the carriage to move forward so that the log could be cut by a band saw which, in plain view, passed over certain pulleys.

The respondent, a young man nineteen years and six months of age, had for some time been employed as a laborer in and about the mill, had never worked on or about the saw

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carriage, and had no experience as a dogger. About half past seven on the morning of the accident, the foreman of the mill, without giving him any instructions, directed him to go upon the carriage and work as dogger. Respondent informed the foreman he had no experience in that work. One Grant, the sawyer, gave him no instructions other than to inform him the work was a hurry-up job.

About eleven o'clock of the same morning, a small cedar log was placed on the carriage. Respondent set and secured the rear dog, but caused it to extend too far across the log. When the log had been sawed to within about four or five feet of the dog, the sawyer noticed the saw would strike the dog. Thereupon he reversed the carriage and, with a motion of his hand, directed the respondent to take out and reset the dog. Respondent did so, but again placed it too far across the log toward the line of the saw. Again the sawyer stopped the carriage and, by the same motion, impatiently ordered respondent to take out the dog. The sawyer testified he also leaned over and told respondent, then about four feet away, to take out the dog and leave it out. Respondent testified he did not hear this order. Thereupon respondent removed the dog and the sawyer immediately started the carriage. Respondent, thinking he was again directed to reset the dog, continued to do so, but just as he brought the dog down upon the log, the saw struck and injured him. The sawyer noticed respondent's last movement in time to stop the carriage and prevent the dog from breaking the saw, but not in time to prevent respondent's injury.

Respondent's allegations of negligence in substance were, (1) that appellant did not instruct him or warn him of the dangers incident to his employment; (2) that the sawyer, who at the time was acting as appellant's vice principal, suddenly and without warning or notice to respondent, started the carriage towards the saw.

We have carefully examined the evidence and conclude the issues of appellant's alleged negligence, respondent's alleged

contributory negligence, and assumption of risk, were for the consideration of the jury, and that the motions were properly denied. Appellant's counsel have presented their contentions in a thorough and able manner in their brief, and also on oral argument. They seem impressed with the idea that the evidence utterly fails to show negligence on appellant's part, but that it does show respondent's negligence. The question before us is not whether the weight and convincing force of the evidence was with appellant, but whether there was evidence sufficient to require a submission of the issues of fact to the jury and sustain their verdict. In determining this question it is the duty of an appellate court to regard and construe the evidence most favorably to respondent. In *Newcomb v. Puget Sound etc. Boiler Works*, 54 Wash. 419, 103 Pac. 456, this court in passing on the appellant's motions for a nonsuit and a directed verdict, said:

"The appellant's brief shows its positive conviction that the evidence overwhelmingly preponderates in its favor. . . . The appellant's mistake on this appeal is that it fails to appreciate the force of the evidence given by the respondent, which of itself is sufficient to sustain the verdict. The jury were entitled to credit him. . . . The most that can be said on behalf of appellant is that the evidence was conflicting, the respondent's statement being denied by other witnesses."

The evidence, although disputed, was unquestionably sufficient to show respondent was inexperienced; that he had worked as dogger only a few hours; that he received no instructions other than to be told his work was a hurry-up job; that the setter who worked on the carriage found it necessary to aid him, and did so; that the log being sawed at the time of the accident was somewhat rotten and difficult to dog; that after respondent had improperly set the dog the first time, the sawyer with a motion of his hand directed him to remove and reset it; that respondent did so, but replaced the dog too far across the log; that the sawyer again stopped the carriage; that respondent was then only about

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four feet from the saw; that with considerable impatience the sawyer repeated his former signal made with his hand; that respondent removed the dog; that the sawyer immediately started the carriage; that respondent was then standing with his back towards the saw, engaged in the supposed discharge of his duties; that he again attempted to set the dog, and was struck by the saw. The sawyer and other witnesses on behalf of appellant testified appellant had no code of signals to the dogger for use by the sawyer. The only signals which appear to have been given by the witnesses upon the trial in the presence of the jury are not shown and manifestly cannot appear in the record. The sawyer testified he leaned over the saw when giving his last order, and told respondent to take the dog out and leave it out. Two other witnesses, not quite so close to the sawyer as was respondent, testified that the sawyer spoke to respondent, and in their examination in chief testify to what he said, but upon their cross-examination they seem rather to have noticed him speaking, and to have known what he would say, and probably did say, by reason of their experience, and their previous observation of proper methods under such conditions. The carriage was stopped, but it is conceded the mill was running so noisily that it was practically impossible to understand spoken words; and that, by reason of this fact, motions and signals were generally used. Respondent positively testified he did not hear any oral order given by the sawyer.

Taking all the evidence into consideration, it was for the jury to determine whether appellant was negligent as claimed, whether respondent was properly instructed and warned, whether he understood his duties and the dangers attending his employment, whether he assumed the risk, and whether he was guilty of contributory negligence. Respondent was young and inexperienced. He had made two mistakes in placing the dog. He made a third trial, and had he completed his efforts would probably have failed again.

The sawyer started the carriage before he had replaced the dog. He testified he had told respondent to take the dog out and keep it out; that he did take it out; that he stepped back on the carriage a foot or two; that he seemed to be out of danger, and that he—the sawyer—believed respondent understood the verbal order. It is nevertheless apparent that the sawyer immediately started the carriage, and that within a moment or two the respondent, who said his back was toward the saw, was injured while trying to reset the dog.

Appellant further contends the sawyer was not its vice principal but the fellow servant of respondent, as they were jointly engaged in the common undertaking of sawing logs. A sawyer and dogger under certain conditions may be fellow servants, but this court had repeatedly announced the rule that the sawyer, when charged with a nondelegable duty of his master, becomes and is a vice principal. *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326; *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046; *St. John v. Cascade Lumber & Shingle Co.*, 53 Wash. 193, 101 Pac. 833.

There was evidence that the carriage moved about five miles an hour during the process of sawing; that when the sawyer suddenly and unexpectedly started the carriage, respondent was about four feet from the saw; that with his back towards the saw he was about to replace, reset, and fasten the dog; that the sawyer with a motion of his hands had repeated the identical signal he had theretofore given for withdrawing and resetting the dog; that while respondent was thus engaged, he was in a position of safety as long as the carriage remained stationary; that the sawyer started the carriage without notice or warning, and that respondent was thereby exposed to sudden and unexpected danger and was injured. While respondent was thus employed, a non-delegable duty was imposed upon the master not to utilize

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any agency which would subject him to unnecessary danger. When the sawyer did place such an agency in operation, he was not acting as respondent's fellow servant, but as vice principal of the master, and his failure to then and there perform the nondelegable duty of the master was the negligence of the latter.

"We have held that where a master employs a number of servants to work with a dangerous agency and gives to one servant exclusive control of the agency with power to direct where the other servants shall work and the manner in which they shall work, the one given control is the representative of the master, that his negligence is the negligence of the master, and any one injured by reason of such negligence, not contributed to by him, has a cause of action against the master for the injury so suffered." *Dyer v. Union Iron Works*, 64 Wash. 577, 117 Pac. 387.

See, also, *Comrade v. Atlas Lumber & Shingle Co.*, 44 Wash. 470, 87 Pac. 517; *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765.

Appellant contends that instructions given by the court constituted prejudicial error, in that no evidence was admitted on which they could be predicated, and that an immaterial issue was thereby submitted, tending to confuse the jury in reaching their verdict. We find no error in this regard. Appellant seems to have fallen into error in its understanding of the evidence. In any event, we are satisfied the instructions given, when considered as a whole, fairly stated the law and were free from prejudicial error.

The jury returned a verdict for \$6,900, which the trial judge, in passing upon appellant's motion for a new trial, reduced to \$4,500. Judgment, with respondent's assent, was entered for the latter sum. Appellant now contends the damages are still excessive. Respondent at the time of his injury was not quite twenty years of age. He lost all of the first three fingers of his right hand, and the fourth finger was so severely injured as to render it practically useless. The trial judge made a material reduction. He understood the

nature, extent, and permanent results of the injury, and we cannot conclude the judgment is so excessive as to require a further reduction by this court.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, ELLIS, and MORRIS, JJ., concur.

[No. 9482. Department One. December 2, 1911.]

THE STATE OF WASHINGTON, *Appellant*, v. O. O. ORT *et al.*,
Respondents.¹

PUBLIC LANDS—STATE LANDS—SALE—CONTRACTS—VALIDITY—MISTAKE—DEEDS—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 6680, providing that any sale or lease of state land made by mistake, or not in accordance with law, shall be void and the contract or lease assumed thereon shall be of no effect and the holder of the contract required to surrender the same, applies only to executory contracts, and not to sales that have been fully executed by delivery of the state deed and full payment of the price.

SAME—STATE DEED—VACATING—CHARACTER OF LAND—MISTAKE OF OFFICERS. In the absence of fraud or connivance of the purchaser, the state cannot maintain an action to set aside its deed of state lands on the ground of mistake of its officers in determining that the character of the lands is agricultural, when in fact it contained more than one million feet of merchantable timber, and under the law could not be sold as agricultural land.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered November 28, 1910, in favor of the defendants, after a trial on the merits, in an action to cancel state deeds. Affirmed.

The Attorney General, and Geo. A. Lee and S. H. Kelleran, *Assistants*, for appellant.

Dysart & Ellsbury and *Forney & Ponder*, for respondents.

FULLERTON, J.—In April, 1906, one O. O. Ort and one Elwood Purcell made separate applications to purchase from

¹Reported in 119 Pac. 21.

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the state two certain adjoining quarter sections of state land, situate in Lewis county. In his application, which was made upon one of the state's forms, Ort stated, in answer to specific questions, that the land was agricultural and pastoral and that he did not consider it valuable as timber land. Purcell stated in his application that the quarter section he sought to buy was all agricultural land, being nearly all swamp and creek bottom, with scattering fir timber, not valuable for timber. On receipt of the applications, the state sent out its inspector to view the lands and make a report thereon. The inspector reported the land to be suitable chiefly for agricultural purposes, having but little timber upon it, which was of no considerable value. The state board having charge of the disposition of the state lands accepted the statements of the applicants and the report as true; and acting thereon, sold the land to the respective applicants at the minimum price allowed by law, and issued deeds on behalf of the state therefor. The procedure followed by the state officers was that required by the then existing laws relating to the sale of state lands of the character these were assumed to be, and on their face were regular and sufficient to pass the state's title in the lands to the purchasers. After acquiring title to the lands, the purchasers conveyed them to the Carlisle-Pennell Lumber Company, a corporation; in fact, it is conceded in the record that the purchases were made in the behalf of that company; it desiring control of the lands as a means of protecting timber lands it owned in the vicinity, and because the only feasible route for a logging road from such timber lands to the market place for logs was over these quarter sections.

The then existing statutes relating to the sale of state lands, however, provided that, whenever the estimated amount of timber of commercial value on any quarter section exceeded one million feet, the timber thereon should be sold separately from the land, under a condition that the same should revert to the state if it was not removed from the land within three

years from the date of purchase. Sometime after the sales of these lands had been consummated, the land officers of the state discovered that each of the quarter sections contained timber of commercial value estimated to exceed one million feet; and conceiving that the sale thereof without first selling the timber thereon separately was in contravention of the statute, and therefore invalid, caused the present action to be begun to recover the same. In the complaint it is alleged that the inspector who examined the land reported that there was not merchantable timber on the same to exceed one million feet through inadvertence, neglect, or mistake; and that his report, and the applications of Ort and Purcell, were "false and fraudulent in this, that said land contained more than one million feet of merchantable timber, to wit, more than eight million feet of fir, cedar and hemlock." Issue was taken on the allegations of the complaint and a trial had, which resulted in a judgment in favor of the defendants. The state appeals.

On the trial, the state made no attempt to show fraud on the part of the applicants for the land, or on the part of the cruiser who inspected the land on behalf of the state. It contented itself with showing that each quarter section of the land contained at the time of the application and sale more than one million feet of merchantable timber, and that its officers were led to believe the contrary through the inadvertence or mistake of its inspector.

Section 6680 of Rem. & Bal. Code, provides that any sale or lease of state land made by mistake, or not in accordance with law, or obtained by fraud or misrepresentation, shall be void and the contract of purchase or lease issued thereon shall be of no effect, and that the holder of such contract or lease shall be required to surrender the same to the commissioner of public lands. It is on this section of the statute that the state bases its claim of right to recover. It contends that these quarter sections were not sold in accordance with law, but by mistake and inadvertence, because they con-

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tained at the time of the sale more than one million feet of timber of commercial value, and hence could not be sold under the statute without first selling the timber thereon separately from the land itself.

The evidence convinces us that each of the two quarter sections did have timber of commercial value thereon exceeding one million feet, and that, under the statute, the timber thereon should have been sold first and apart from the land; but we are unable to concede that, for this reason alone, the state may maintain the present action. In each of these instances the purchase price of the land has been paid and deeds have been issued. The state has thus parted with its title to the property; and if it sets aside the sale, it must do so on some equitable principle that authorizes an individual to set aside and declare for naught his executed contracts. The statute relied upon by the state, as we view it, has no application to a case of this kind. It will be noticed that it refers throughout to executory contracts, contracts wherein the state has not parted with its interests, and wherein something remains to be done by each of the parties before the sale is consummated. But here the contract is executed. Each of the parties have dealt at arm's length and have completed the transaction. The state therefore stands in relation to the respondents as one attempting to avoid its executed contract.

That the state may have innocently made a mistake as to the character of the land is no ground for setting aside its sale. It can vacate and set aside its consummated sale of land only in those cases where fraud has been practiced upon its officers by the purchasers or through their connivance. This we held in *State v. Houston*, 56 Wash. 268, 105 Pac. 474. That was a case where the state sought to set aside a deed executed for certain oyster lands which it was claimed had been sold under a mistake as to the character of the land. But we held that the state was obligated to discover the character of the land prior to the time it made the sale, and that

the finding of its officers to the effect that the land was of a character that could be sold in the manner in which it was sold was conclusive upon the state in the absence of fraud practiced upon it by the purchaser.

Such, also, is the case at bar. Whether this land contained more than one million feet of timber was a question of fact which the state determined adversely to the contention when the sale was made. It cannot now vacate the sale then made on the mere showing that it was mistaken as to the fact. As we say, it must be made to appear that the mistake was brought about by the fraud or connivance of the purchasers.

The judgment of the trial court was right, and it will stand affirmed.

DUNBAR, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9671. Department One. December 2, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. A. B. NICK,
Appellant.¹

BRIBERY — PUBLIC OFFICER — INDICTMENT — SUFFICIENCY. An indictment for bribing a police officer of the city of Seattle to influence him not to prohibit and prevent the accused from conducting a house of prostitution, is not demurrable as failing to allege that a policeman of a city is a "public officer" within Rem. & Bal. Code, § 2320, under which the indictment was drawn; since the description of the act which he was bribed to do sufficiently shows that he was an officer, and inferentially alleges his authority; and, also, for the reason that the court will take judicial notice of the city charter, from which it appears that a policeman is such a public officer.

BRIBERY — PUBLIC OFFICERS — STATUTES — CONSTRUCTION — EJUSDEM GENERIS. Rem. & Bal. Code, § 2320, defining bribery as to certain enumerated officers, and providing that it shall be a crime to give a reward "to a person executing any of the functions of a public officer other than those heretofore specified," is not subject to the rule of *ejusdem generis*; but covers the bribery of all public officers.

¹Reported in 119 Pac. 15.

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Appeal from a judgment of the superior court for King county, Ronald, J., entered April 22, 1911, upon a trial and conviction of bribery. Affirmed.

Gill, Hoyt & Frye and *R. L. Blewett*, for appellant.

John F. Murphy and *Hugh M. Caldwell*, for respondent.

FULLERTON, J.—The appellant was indicted by the grand jury of King county for the crime of bribing a public officer, the charging part of the indictment reading as follows:

“The said A. B. Nick alias A. B. Nickerson, on the 9th day of March, 1911, in the County of King, State of Washington, did then and there wilfully, unlawfully, feloniously and corruptly offer and give a compensation and gratuity of ten dollars (\$10) in lawful money of the United States of America, and five dollars (\$5) in lawful money of the Dominion of Canada, to H. S. Thompson, then and there a person duly and regularly executing the functions of a public officer, to wit, the functions of a police officer of the city of Seattle, said county and state, with intent him, the said H. S. Thompson, to influence with respect to an act and decision in the exercise of his powers and functions as such officer, to wit, to influence the said H. S. Thompson to disregard and ignore his functions and power to prohibit and prevent the said A. B. Nick alias A. B. Nickerson from conducting a house of prostitution in the said Seattle, King county, Washington.”

The indictment was framed under § 2320 of Rem. & Bal. Code, which provides:

“Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any executive or administrative officer of the state, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a member of the legislature, or attempt, directly or indirectly, by menace, deceit, suppression of truth or other corrupt means, to influence such member to give or withhold his vote, or to absent himself from the house of which he is a member or from any committee thereof; or who shall give,

offer or promise, directly or indirectly, any compensation, gratuity or reward to a judicial officer, juror, referee, arbitrator, appraiser, assessor or other person authorized by law to hear or determine any question, matter, cause, proceeding or controversy, with intent to influence his action, vote, opinion or decision thereupon; or shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as hereinbefore specified, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both."

On being arraigned the appellant demurred to the indictment on the ground that it did not state facts sufficient to constitute a crime. The demurrer was overruled, whereupon he entered a plea of not guilty, and was tried, convicted and sentenced for the crime charged in the information. From the judgment of conviction he appeals.

The record suggests but one question, namely, the sufficiency of the allegation of the indictment to constitute a crime. The appellant first contends that a police officer as such is not a public officer, and does not ordinarily perform the functions of a public officer; that his powers and duties are not defined by statute, but are wholly the creation of municipal ordinances, which the court cannot know judicially; hence, it is argued that this information is fatally defective in that it does not set forth the powers and duties of the police officer alleged to have been bribed, so that the court may know that he was such a public officer as the statute made it a crime to bribe. The information, it will be observed, does set out the specific acts which the officer was bribed to refrain from doing, and it is clear that this act was one that involved the powers and functions of a public officer. True, it is not alleged in direct terms that the officer had the power and authority to do what he is

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charged to have refrained from doing, but it is inferentially so alleged, and this is sufficient against a general demurrer. But while this would seem sufficient to meet the objection raised, we think the indictment sufficient for another reason. The courts can know judicially the contents of the charter of the city of Seattle; hence, they can know that there is a police department in the city of Seattle composed of police officers who exercise the powers and functions of public officers; that is to say, they have power to make arrests for public offenses already committed, to make arrests to prevent the commission of public offenses, and to maintain the peace and quiet of the city. These are clearly the functions of public officers.

A second contention is that, conceding the police officer to be a public officer, we must apply to the particular clause of the statute upon which this indictment is founded the rule of *ejusdem generis*, and restrict the meaning of the word "person" to the class enumerated in the preceding part of the section. This is a rule of construction, undoubtedly, where general words follow an enumeration of particular things, but this statute contains words which render the rule inapplicable. It expressly makes it a crime to give a gratuity or reward "to a person executing any of the functions of a public officer other than as hereinbefore specified;" showing, as we think, a clear manifestation of the purpose to include acts and things other than those specifically enumerated in the preceding part of the section. It must therefore be given the effect of an independent clause, and so construed it must be held to include public officers other than those specifically enumerated.

The judgment is affirmed.

DUNBAR, C. J., GOSE, and PARKER, JJ., concur.

[No. 9876. Department One. December 2, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK ROSS,
Appellant.¹

ELECTIONS — OFFENSES — FALSE REGISTRATION — STATUTES — CONSTRUCTION. A voter is not guilty of false registration in incorrectly stating his place of residence, when he did not register in the wrong precinct, under Rem. & Bal. Code, § 4768, defining false registration as the taking of a false oath, falsely personating another and procuring registration of the person as personated, misrepresenting his name or causing any name to be registered "otherwise than in the manner provided by the act;" in view of the fact that the matter of residence is not included in the oath nor among the acts specifically enumerated as constituting the criminal offense (GOSE, ELLIS, and MORRIS, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Main, J., entered April 29, 1911, upon a trial and conviction of false registration. Reversed.

Gill, Hoyt & Frye, for appellant.

John F. Murphy and *George H. Rummens*, for respondent.

PARKER, J.—The defendant has appealed to this court from his conviction in the superior court for King county upon an information charging as follows:

"He, said Frank Ross, in the county of King, state of Washington, on the 26th day of January, 1911, did wilfully, unlawfully and feloniously place or cause his name to be placed upon the registry list, for qualified voters at any election to be held during the year A. D. 1911, of the first precinct of the first ward of the city of Seattle, said county and state, otherwise than in the manner provided by law, to wit:

"That on said date the said Frank Ross appeared in person before Albert Linstrom, then and there a duly and regularly qualified and sworn deputy clerk of the city of Seattle, King county, state of Washington, and applied to be registered

¹Reported in 119 Pac. 20.

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as a voter in said city, county and state, and gave his name, and number of place of residence as Western Hotel, N. E. Cor. First avenue south and Washington street, in said city of Seattle, when in truth and in fact the said Western Hotel, N. E. Cor. First avenue south and Washington street, the place of residence so given by him, was not then and there the place of residence of the said Frank Ross."

Reversal of the judgment of conviction is sought upon the grounds, among others, that the trial court erred in overruling appellant's demurrer to the information and his motion for arrest of judgment, for the reason that the information does not charge facts constituting a crime.

It is at once apparent that the only fact charged by this information and relied upon by the prosecuting attorney to rest appellant's conviction upon, is that he gave as the place of his residence the Western Hotel, which was not then his place of residence. There is nothing in this information even inferentially indicating that appellant was not lawfully entitled to vote in the precinct for which he registered. The provisions of our statute which it is claimed by the prosecuting attorney, make the mere giving of a wrong place of residence for registration a crime, are found in Rem. & Bal. Code, § 4775 as follows:

"If any person shall falsely swear, or affirm, in taking the oath or making the affirmation prescribed in section 4768, or shall falsely personate another, and procure the person so personated to be registered, or if any person shall represent his name to the city or town clerk, or officer of registration, to be different from what it actually is, and cause such name to be registered, or if any person shall cause any name to be placed upon the registry list otherwise than in the manner provided in this act, he shall be deemed guilty of a felony, and upon conviction be punished by confinement and hard labor in the penitentiary not more than five years nor less than one year."

Let us notice these several acts with a view to determining whether or not the act charged against appellant is among

them. It is plain that appellant is not charged with falsely swearing to any of the facts embodied in the oath prescribed by § 4768, for that oath is silent as to place of residence of the voter, except as to it being in the state, county and precinct for certain periods. It is plain that appellant is not charged with impersonating another and procuring such person to be registered. It is plain that appellant is not charged with representing his name to be different from what it actually is.

We have, then, to consider only the last clause of that portion of the section mentioning the acts which are punishable thereunder; to wit, "If any person shall cause any name to be placed upon the registry list otherwise than in the manner provided by this act." This is the crime which the prosecuting attorney contends was committed by appellant, when he gave his place of residence. We are not able to agree with this contention. We do not think that merely alleging that appellant gave his place of residence different from what it was in fact, without any allegation that his residence was not in the precinct for which he registered, charges him with the crime mentioned in this last quoted clause. This is not one of the facts embodied in the oath prescribed by law which the person registering must take. It seems to us that, if the legislature had intended to visit this severe penalty upon one who merely gave an untruthful statement as to his exact place of residence, there would have been much clearer language so indicating than we find here. The fact that the statement of the voter's residence in the prescribed oath descends, in its details, only to the precinct, together with the fact that these other acts declared to be criminal are specifically enumerated in § 4775, leads us to conclude that the act charged against appellant is not a crime under that section. As said in *State ex rel. Coon v. Hay*, 51 Wash. 576, 99 Pac. 748, "The penalty for vio-

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lating this statute is severe. It should not attach unless the meaning of the language is plain and the violation clear."

The judgment is reversed.

MOUNT and FULLERTON, JJ., concur.

ON REHEARING.

[*En Banc.* March 26, 1912.]

PER CURIAM.—Argument upon petition for rehearing of this case was heard by the court *en banc* on February 27, 1912. A majority of the court are of the opinion that the cause was properly disposed of by the decision of Department One, rendered December 2, 1911. We therefore adhere to the views expressed in that decision, and reverse the judgment of the trial court.

GOSE, J. (dissenting).—I think the information charges a crime. While the information is predicated upon the provisions of the code, Rem. & Bal. Code, § 4775, this section must be read in connection with sections 4767, 4768, in order to get a correct understanding of the case. Section 4767 provides:

"The poll-books shall be so arranged as to admit the alphabetical classification of the names of the voters, and ruled in parallel columns, with appropriate heads as follows: Date of registration; names; age; occupation; place of residence; . . . Under the head of place of residence shall be noted the number of lot and block or number and street where the applicant resides or some other definite description sufficient to locate the residence; and the voter so registered . . . shall sign his name in each of the duplicate poll-books on the registry opposite the entries above required, in the column headed 'Signature,' . . ."

Section 4768 provides:

"No person shall be registered unless he appears in person before the city or town clerk or officer of registration, at his

office during office hours, and apply to be registered and give his name, age, occupation, number of place or residence; . . .”

The applicable part of § 4775 is as follows:

“If any person shall falsely swear, or affirm, in taking the oath or making the affirmation prescribed in section 4768, or shall falsely personate another, and procure the person so personated to be registered, or if any person shall represent his name to the city or town clerk, or officer of registration to be different from what it actually is, and cause such name to be registered, or if any person shall cause any name to be placed upon the registry list otherwise than in the manner provided in this act, he shall be deemed guilty of a felony. . . .”

The information charges that the appellant appeared before the deputy clerk of the city of Seattle in King county, Washington, and applied to be registered as a voter in such city, and gave his place of residence as Western Hotel, in the city of Seattle, when in truth and in fact that was not his place of residence. This was in direct contravention of the statute. Under the provisions of § 4768, he could not be registered without applying to the clerk and giving his place of residence. Section 4767 makes specific provision for recording the place of residence of each voter in the poll books provided for that purpose. Rem. & Bal. Code, § 4766, provides that the registration books shall be closed in all general, special, and municipal elections for the purpose of organization, twenty days preceding any election to be held in the city, town, or precinct. Rem. & Bal. Code, § 4786, provides that each of the recognized political parties may have one challenger at the polls of each voting precinct.

The purpose of the several provisions of the statute is to protect the integrity of the ballot. The statute has no other purpose. This clearly appears from the data required of each voter applying to register. It is further disclosed in that it requires poll books to be closed twenty days before the election. If the applicant gives honest information, the poll books furnish exact data for identifying him and ascertain-

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ing whether he is a qualified voter. The quoted part of § 4775 makes it criminal for "any person" to falsely swear in taking the prescribed oath, or to falsely personate another. It also makes it a crime for "any person" to falsely represent his name and cause such name to be registered. It likewise makes it a crime if "any person" shall cause "any name" to be placed on the registry list, "otherwise than in the manner prescribed *in this act.*" It becomes pertinent, therefore, to turn to other parts of the act to find the "manner prescribed" for securing registration. This is answered by § 4768, which directs that no person shall be registered until he appears before the proper officer and gives his place of residence. This information is then noted upon the poll book, which the voter is required to sign. A reading of these several sections together makes clear the purpose and intent of the law. It seems clear to my mind that, if we will only accept the law as the law-making branch of the government has declared it to be, there is no difficulty in reaching the conclusion that the information charges a crime.

The majority opinion says that there is nothing in the information "even inferentially indicating that the appellant was not lawfully entitled to vote in the precinct for which he is registered." It further states that it is plain that the appellant is not charged "with falsely swearing," and that it is plain that he is not charged with "impersonating" another and procuring such person to be registered. These suggestions seem to me wholly inapposite. The information does charge that the appellant caused his name to be placed upon the registry by giving a false residence. The majority opinion leads to the absurd result that the voter who refuses to give his place of residence cannot either register or vote, while the voter who gives a false residence may both register and vote without incurring guilt. I cannot free my mind from the conviction that the court has not only misinter-

preted both the letter and the spirit of the statute, but that it has rendered a part of the statute entirely nugatory. I therefore dissent.

ELLIS and MORRIS, JJ., concur with GOSE, J.

[No. 10022. Department One. December 2, 1911.]

CHARLES BRUHN *et al.*, *Respondents*, v. J. E. STEFFINS,
Appellant.¹

APPEAL—BONDS—OBLIGEE—ADVERSE PARTY—FILING NEW BOND. An appeal will be dismissed where the judgment was in favor of one of the plaintiffs, and the bond on appeal was given to the other plaintiffs, as obligees, who had no interest in the judgment; and there being in effect no bond to the adverse party, the same cannot be amended by the filing of a new bond under Rem. & Bal. Code, § 1734, allowing amendments of defects or informalities in a bond (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Franklin county, Pendergast, J., entered July 26, 1911, in favor of one of the plaintiffs, in an action to quiet title, after a trial on the merits. Appeal dismissed.

Horrigan & Coad, for appellant.

Englehart & Rigg, for respondent Pasco-Columbia River Realty Company.

MOUNT, J.—Motion to dismiss the appeal herein. It appears that Charles Bruhn and the Pasco-Columbia River Realty Company, a corporation, brought an action against J. E. Steffins and others, to quiet title to certain lands in Franklin county. Upon issues joined, the trial court entered a judgment in favor of the Pasco-Columbia River Realty Company, quieting its title to the lands against the defendant J. E. Steffins. The judgment was not in favor of Bruhn

¹Reported in 119 Pac. 29.

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and wife, and they have no interest therein. J. E. Steffins gave a notice of appeal from the judgment. The notice was served upon Bruhn and wife and also the Pasco-Columbia River Realty Company. The appellant filed a cost bond on appeal. This bond recites:

"That we, J. E. Steffins, appellant in the above entitled action, as principal, and Daniel Horrigan, as surety, are held and firmly bound to Charles Bruhn and Pauline Bruhn, his wife, in the above entitled action, in the penal sum of two hundred (\$200) dollars, for the payment of which sum well and truly to be made, we bind ourselves firmly, jointly and severally by these presents."

The bond then, after describing the judgment appealed from, recites:

"Now, therefore, if the above bounden appellant, J. E. Steffins, will pay to the said Charles Bruhn and Pauline Bruhn, his wife, the respondents herein, all costs and damages that may be awarded against the appellant on this appeal, or on the dismissal thereof, not exceeding the sum of two hundred (\$200) dollars, then this bond to be void; otherwise in full force and effect."

The statute requires the bond to be given to the "adverse party." Rem. & Bal. Code, § 1721. An adverse party is one whose interests will be affected by a reversal or modification of the judgment appealed from. *Seattle Trust Co. v. Pitner*, 17 Wash. 365, 49 Pac. 505. It is plain, therefore, that Bruhn and wife are not adverse parties, for they have no interest in the judgment in any way. The bond is no protection whatever for the Pasco-Columbia River Realty Company, which is the only adverse party; because this court could not enter a judgment against the surety in the bond, for the bond precludes such a judgment. Neither could the Pasco-Columbia River Realty Company maintain an action upon the bond, for it is not so conditioned. Appellant relies upon the case of *Westland Pub. Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096. In that case the bond ran to the state of Washington, and we held that the intent was

manifest that the bond was for the protection of the adverse party. In this case, however, it is not manifest that the bond was for the protection of the adverse party, because it is plainly for one who had ceased to have any interest in the litigation.

Appellant insists that he should now be permitted to file a new bond under the provisions of Rem. & Bal. Code, § 1734. If this were an informality or defect in a bond otherwise sufficient, this section would apply, but this bond is so defective that it amounts to no bond or security at all for the respondent Pasco-Columbia River Realty Company, which is the only adverse party.

The appeal is therefore dismissed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—I am of the opinion that § 1734 of the code was passed for the express purpose of permitting defects such as is shown in the present bond to be corrected. I am compelled to dissent, therefore, from the order of dismissal.

[No. 9887. Department One. December 2, 1911.]

PETER CASASSA *et al.*, *Appellants*, v. THE CITY OF SEATTLE
et al., *Respondents*.¹

EMINENT DOMAIN—JUDGMENT—CONCLUSIVENESS. The judgment in condemnation proceedings concludes the parties and their privies as to all matters which were put in issue.

EMINENT DOMAIN—DAMAGES—REGRADE OF STREET—SLOPE ON LOTS—AWARD—RES JUDICATA—MATTERS CONCLUDED. In condemnation proceedings to regrade a street by making a deep cut and a slope of forty-five degrees on abutting property to meet the cut, an award of damages to the property covers only the damage to the lots arising from the cut in the street and the specified slope on the lots, and not damages for the removal of lateral support resulting from the fact that the nature of the soil was such that a slope of forty-five

¹Reported in 119 Pac. 13.

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degrees was not sufficient to support the balance of the lot and prevent the remaining soil from falling into the street; and it is immaterial that the ordinance and petition required the condemnation of all lands and rights necessary to be taken, used, or damaged; since the city determined what slope was necessary and sufficient for lateral support, and that question will not be litigated in the condemnation proceedings.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES—LIABILITY OF CONTRACTOR. Where, under the authority of condemnation proceedings, a city made a regrade of a street and a slope of forty-five degrees on abutting lots, but the nature of the soil was such that the slope was not sufficient for lateral support, and the balance of the lots were damaged by slides, the city, and not the contractor doing the work, is liable for the damage, where the slides would have occurred whether the work had been carefully done or not.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 11, 1911, in favor of the defendants, dismissing an action for damages, upon withdrawing the same from the consideration of the jury. Affirmed in part and reversed as to the city.

Walter A. Keene and *E. H. Guie*, for appellants.

Leander T. Turner, *Sandford C. Rose*, and *O. B. Thorg-rimson*, for respondent *Lewis & Wiley*.

Scott Calhoun and *H. D. Hughes*, for respondent City of Seattle.

MOUNT, J.—Plaintiffs brought this action to recover damages caused by a regrade of Tenth avenue and Plummer street, in the city of Seattle. After the plaintiffs had introduced all of their evidence, the trial court was of the opinion that the defendants were not liable, and therefore discharged the jury and dismissed the action. The plaintiffs have appealed.

It appears that the plaintiffs are the owners of two city lots, on the east side of Tenth avenue, and immediately in front of the intersection of Plummer street with Tenth avenue, in the city of Seattle. This avenue extends north and south, while Plummer street extends west from Tenth avenue.

The plaintiffs' property, prior to the regrade, had been improved, and two frame dwelling houses had been erected thereon. The lots were level with the streets. They were situated on the west slope of what is known as Beacon Hill. Immediately to the east of these lots and in the rear thereof, the hill rises abruptly to a considerable height, and to the westward of Tenth avenue the hill slopes down toward the waters of the Sound. The elevation of the lots is about midway between the waters of the Sound and the summit of the hill. In the year 1906, the city of Seattle by ordinance determined to regrade both Plummer street and Tenth avenue, thereby making a cut in front of the lots to a depth of from 55 to 58 feet. The plan was to make a one-to-one slope from the street upon the lots, which means to cut down the front part of the lots at an angle of forty-five degrees. This ordinance provided for the ascertainment and payment of compensation for property taken or damaged in the change of grade. Thereupon the city, by an action in condemnation, proceeded against the owners of the lots to acquire the right to make the grade and slope as above stated. That action resulted in an award of damages in the sum of \$1,000, which the city paid to the then owners. Thereafter the plaintiffs in this action acquired the title to the lots, and the city let a contract to the defendant Lewis & Wiley Company, to make the grade.

Before the work was commenced in front of plaintiffs' property, the plaintiffs caused the buildings to be removed to the rear of the lots and beyond where the slope would reach. The defendant Lewis & Wiley Company proceeded, as required by the contract with the city, to make the cut and slope. This was done by blasting and sluicing. The formation of the hillside was a stratified blue clay which was subject to slides. This fact appears to have been known to the city officers prior to the condemnation. While the excavation was in progress, the soil of plaintiffs' lots by its own weight slid beyond the slope as provided into the ex-

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cavation in the streets, so that the houses were destroyed and the lots themselves left in an irregular and uneven condition. The city ordinance under which the condemnation proceedings were had provided that,

"All the lands, rights, privileges, and other property necessary to be taken, used or damaged in the grading or regrading of the streets in question and approaches thereto, in conformity with such established grades, and in the construction of the viaducts and slopes and retaining walls for cuts and fills upon the property abutting upon said streets and approaches thereto, are hereby condemned and appropriated for the public use, for the purpose of making such changes of grade and in the construction of the necessary viaducts and slopes and retaining walls in the grading and regrading of said streets." Seattle Ordinance, No. 13,320.

The condemnation petition also recites that the object for which the proceeding was brought was to ascertain the damages to the land and property rights necessarily taken or damaged by reason of the proposed improvement, and by the construction of the necessary viaducts and slopes and retaining walls for cuts and fills on abutting property in the manner prescribed by said ordinance, and for a release from all liability to the owners of such property, or others having an interest therein that may be damaged or injuriously affected by reason of the improvement provided for in said ordinance. The trial court, upon these facts, was of the opinion that the purpose of changing the slopes was to protect the street and travel thereon from slides which might occur, and that the whole damage to the property by reason of the cut was determined in the condemnation proceedings and paid to and accepted by the owners of the property at that time; and because the character of the soil and its disposition to slide was known, the damages which occurred on that account were, or should have been, tried and determined in the condemnation proceedings, and may not be tried in this action, even though the damages were actually greater than might have been anticipated at that time.

This court has many times held that parties and their privies are concluded as to all matters which were put in issue in the condemnation proceedings. *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757, and cases there cited. In *Parke v. Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 34 Am. St. 839, 20 L. R. A. 68, this court held the city liable for damages caused in grading the street, whereby the abutting land was deprived of lateral support; and in *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, this court held that the city may not lower the surface of the street without subjecting itself to damages for the injury thereby occasioned to the abutting owner. It is apparent from the rules laid down in these cases, that the city was liable for damages caused by the removal of the lateral support to the land abutting upon this deep cut. It is also apparent that, if the city condemned the right to make a cut 58 feet deep in front of this property, the judgment in that condemnation proceeding was conclusive of all damages which were or could have been litigated therein; and if the city without negligence proceeded to make the cut, no further liability would be incurred, although greater damages might result than were covered by the award.

In this case it is conceded that the city, in addition to the cut, undertook to make a slope of one-to-one upon the abutting lots. The purpose of this slope is apparent. It was to so cut down the lots that the remaining soil thereon would provide for the lateral support. If the remaining soil would stand upon the slope, the street and travel thereon would thereby be protected, and the only injury, if any, to the lots by reason of the regrade would be the removal of the wedge-shaped tract and the difference between the level lots and the lots in the elevated position above the street. The purpose was therefore two-fold, (1) to protect the street, and (2) to lessen the damage by obviating the question of lateral support. The street was already a public street, and the city did not have to condemn any portion for a street.

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The city had a right to change the grades, provided it did not damage the adjoining lots. *Parke v. Seattle, supra*. The condemnation proceedings gave the city the right to enter upon the lots in question and to construct the slope. As above stated, the theory of the city, no doubt, was that, when the designated slope was constructed, the soil would not slide of its own weight, and the city would thus reduce or entirely obviate the damages caused by the removal of the lateral support. The city assumed that the one-to-one slope would be sufficient for that purpose, and condemned and paid for the right to make that slope to a depth of 58 feet in front of the lots. The buildings located upon the lots were then moved back so that no part thereof was upon the slope. When the contractors for the city proceeded with the work of excavation, the slope was not sufficient to hold the soil, which on account of its character slid into the cut, and carried with it the houses, which were completely demolished.

Respondents now maintain that, because the ordinance required all the lands, rights, and privileges and other property necessary to be taken, used or damaged in the grading or regrading of the streets, and because the petition in condemnation recites that the object for which the proceeding was brought was to ascertain the land and property rights necessarily taken and damaged, and because it was the duty of the lot owners to litigate in the condemnation proceedings every ground of recovery which might have been presented therein, therefore the judgment in the condemnation was *res adjudicata* of the damages claimed in this action. We think there could be no doubt of the application of this rule if the city had taken no more than the slope designated, or substantially no more, as was done in the *Compton* case. It seems plain that the city had a right to take by condemnation such lands and privileges as were necessary to construct the street as proposed. It also seems plain that the city had the right to determine in advance what quantity of land was reasonably necessary to be taken, in order to protect the

street or to protect the lateral support of the abutting property. The property owner could not decide for the city what it was necessary for the city to take. *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 98 Pac. 423, 125 Am. St. 927, 17 L. R. A. (N. S.) 1005. When the city in this case determined that it would take only sufficient land to make a slope of forty-five degrees, the city, as well as the property owner, was bound by that determination. The city in substance thereby said to the property owner: "This much of your property and no more is necessary to be taken. This will protect the street from earth which may fall by reason of the taking away of the lateral support. It is sufficient and all that is necessary." The damages fixed by the award in condemnation were for the part definitely taken and no more, and for the injury to the remainder on account of the part actually taken. We think the question whether the city took sufficient property in the condemnation proceeding could not have been properly litigated there. It would certainly be unreasonable to hold that the city, having taken a parcel of land definitely located, might take as much more as subsequently proved necessary even to the destruction of the buildings upon the land outside of the part taken, without being liable for additional damages.

It appears that the defendant Lewis & Wiley Company was a contractor who did the work as directed by the city. There may be some slight evidence of negligent work, but it is also shown that the damage would have resulted had the work been carefully done. It is apparent, therefore, that, if there is any liability, the city and not the contractor is responsible.

As to the defendant Lewis & Wiley Company, the judgment is therefore affirmed; but as to the city, the judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

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Opinion Per Gose, J.

[No. 9772. Department One. December 2, 1911.]

MAX KELLER, *Appellant*, v. WHITE RIVER LUMBER
COMPANY, *Respondent*.¹

MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL—STARTING ENGINE WITHOUT WARNING. A hook tender who left his station and started a logging engine in the absence of the engineer without giving any warning to a sniper working by his direction on a log to which the chain was attached, is a vice principal and not a fellow servant of the sniper, and his act in starting the engine was the act of the master.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 23, 1911, upon granting a nonsuit in an action for personal injuries sustained by an employee in a logging camp. Reversed.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for appellant.

John P. Hartman, for respondent.

GOSE, J.—This is an appeal from a judgment of nonsuit. The facts are few and simple. The appellant was employed by the respondent as a sniper for its logging crew. His duties were to round the forward end of the logs so that they could be drawn in by the yard engine. The hook tender had charge of the logging crew and directed its work. He was also the signalman. The appellant, while sniping a log to which the cable leading from the engine was attached, was injured by the starting of the engine without warning. The engine was started by the hook tender in the temporary absence of the regular engineer. It was no part of the duties of the hook tender to operate the engine. This duty was performed by the engineer upon receiving a go-ahead signal. Shortly before starting the engine, the hook tender had directed the appellant to resume sniping. When he started the engine he was within fifty feet of the appellant, who was

¹Reported in 119 Pac. 4.

in plain view and working upon the log with his back to the engine. The engine was started without a signal.

The case should not have been withdrawn from the jury. The hook tender was a vice principal. It was his duty to direct the work and to signal the engineer when he desired him to start the engine. Had he given a wrong signal to the engineer, the master would have been clearly liable. When he left his station and started the engine, it was the act of the master. *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592; *Tills v. Great Northern R. Co.*, 50 Wash. 536, 97 Pac. 737, 20 L. R. A. (N. S.) 434; *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1083.

As was said in the *Tills* case, whether the vice principal does the negligent act himself, or directs another to do it, the master is liable. And as was said in the *Westerlund* case, the master is liable, whether the injury proceeds from the giving of a wrong signal or from the failure to give any signal. In *Labatt, Master & Servant*, vol. 2, § 546, it is said that there is no logical difference between the quality of an act done by the order of the vice principal and the quality of the same act when done by him. The learned trial court granted the nonsuit on the authority of *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932, and *Id.*, 42 Wash. 50, 84 Pac. 407. This case holds that the engineer of a logging crew is the fellow servant of the logger. We do not think it has any application to the case at bar. Here the vice principal started the engine. The trial court was influenced by the fact that the master had furnished a competent engineer, and that the injury was caused by the vice principal who was acting without the scope of his authority. This, we are persuaded, does not affect the question of the master's liability.

The judgment is reversed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ.,
concur.

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Opinion Per Gose, J.

[No. 9855. Department One. December 2, 1911.]

ORVILLE HENDERSHOTT *et al.*, Appellants, v. MODERN
WOODMEN OF AMERICA *et al.*, Respondents.¹

THEATERS AND SHOWS—INJURIES TO SPECTATORS—DANGEROUS PREMISES—BACK STAIRWAY—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE. A spectator intending to witness a public exhibition cannot recover for injuries sustained in a fall on a back stairway leading to the back of the hall and stage, which was unlighted and wet and slippery, and obstructed by vines, where she knew it was not the main entrance to the hall, and she passed a safe, well-lighted entrance with notice of the dangerous condition of the other way; since she assumed the risks and was guilty of contributory negligence.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 17, 1911, in favor of the defendant, upon withdrawing from the consideration of the jury an action for personal injuries sustained in a fall upon a stairway. Affirmed.

J. P. Ball, for appellants.

S. A. Bostwick, for respondents.

Gose, J.—This is a suit to recover damages for personal injuries. At the close of the plaintiffs' case, in response to a challenge to the sufficiency of the evidence, a judgment of dismissal was entered. The plaintiffs have appealed.

The facts are these: The respondents, as fraternal organizations, are the owners of a hall in the town of Sultan, known as Woodman's Hall, and used for lodge and entertainment purposes. On the night of September 5, 1910, a play was given at the hall by the children of the town. The auditorium is thirty by seventy feet in dimensions, with a raised stage at its rear, nineteen by thirty feet. The hall is on the lower floor of the building. It is elevated at the rear about eight feet above the surface of the street. The front eleva-

¹Reported in 119 Pac. 2.

tion is somewhat less. On the night in question, the main or front entrance to the hall was well lighted, as was also the hall. The auditorium has a seating capacity of approximately five hundred. On the evening stated, the appellant wife took her little girl and a small boy, the child of her neighbors, to the hall to take part in the play. She did not know the location of the hall, but was directed to it by the children who had been there previously. She passed the front entrance, as she says, without observing it, and upon reaching the rear of the hall she inquired of a lady whom she did not know where she could find the lady who instructed the children for the entertainment. The lady answered that she was on the stage. She then asked her how she could get there, and the lady answered, "You can go that back way, but be very careful of the blackberry bushes." She then proceeded with the children to the stage along the way suggested. In undertaking to return the same way, she slipped upon the second step from the top of the stairway and fell, sustaining the injury for which she seeks redress in this action. After falling, she walked to the street, met her friends, returned, entered the auditorium at its main entrance, and sat through the play. When upon the stage, she had her ticket and intended to go to the auditorium to witness the play.

The stairway upon which she fell is thirty inches in width, about eight feet in height, and made of boards with an eight-inch tread and ten-inch risers, and is not covered. The night was so dark, she says, that in going up the stairway she could not see its condition. It was raining and the stairs, being without covering, were necessarily wet. There was no light at the alley or the stairway. The approach to the stairs is through an alley, with the building upon one side and a high board fence upon the other. The blackberry vines to which the lady referred project through the fence and across the alley. She testified that she knew the entrance which she chose was not the main entrance to the hall. The

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rear stairway when built was intended to be used by the people upon the stage as a fire escape. The respondents did not intend that it should be used for any other purpose. The door leading from the stage to the stairway was usually kept locked upon the inside, but there is no evidence that it was locked upon the night in question. A low stairway leads from the auditorium to the stage.

Upon these facts, we think the learned trial court was not in error in withdrawing the case from the jury. The respondents had provided a safe and well-lighted stairway for all who desired to enter the hall. The size of the hall, the location and darkness of the rear stairway, and the presence of the blackberry vines, all pointed unmistakably to the fact that there was no invitation to the public to enter the hall or the stage in the manner chosen by the appellant. When she passed by the safe, well-lighted entrance and, at the suggestion of a stranger, proceeded up the dark, slippery way, when the darkness was so great that she could not see the condition or character of the stairway, and with the warning that her path was obstructed by vines, she was guilty of negligence, and assumed the hazards which beset her. While her unfortunate injury is to be lamented, it cannot be said to have resulted from any negligence on the part of the respondents.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ.,
concur.

[No. 9835. Department One. December 4, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. OLE HARSTED,
Appellant.¹

ASSAULT—AGGRAVATED ASSAULT—INFORMATION—SUFFICIENCY. An information for an assault with intent to commit sodomy, under Rem. & Bal. Code, § 2414, subd. 6, providing that one committing an assault with intent to commit a felony shall be guilty of assault in the second degree, is sufficient without stating the precise facts constituting the attempt, although the completed felony may be committed in various ways; since it is sufficient to allege a general attempt, and the assault is charged in the language of the statute.

WITNESSES—IMPEACHMENT—REPUTATION. Upon a prosecution for an assault upon a boy eleven years old with intent to commit sodomy, it is not error to refuse an offer to impeach the boy by showing that a physician had reported that he had syphilis and to inquire whether a blood test had been taken; there being no direct offer to prove that he did have the disease.

CRIMINAL LAW—TRIAL—INSTRUCTIONS. In a criminal prosecution, it is not error to reiterate instructions to the effect that the jury should free their minds from passion, prejudice and sympathy, and determine the case wholly upon the evidence without reference to the penalty.

CRIMINAL LAW—TRIAL—DEGREE OF OFFENSE—INSTRUCTIONS. In a prosecution for assault in the second degree, it is not error to refuse instructions as to third degree assault, when there was no evidence calling therefor.

CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS. A reasonable doubt is properly defined as a substantial doubt having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such as arises from the evidence or want of evidence, and the absence of which would, after deliberation, enable one to have a settled and abiding conviction of guilt.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 13, 1911, upon a trial and conviction of assault with intent to commit sodomy. Affirmed.

Gill, Hoyt & Frye, for appellant.

John F. Murphy, Hugh M. Caldwell, and H. B. Butler, for respondent.

¹Reported in 119 Pac. 24.

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GOSZ, J.—This is an appeal from a judgment entered upon a verdict finding the appellant guilty of an assault in the second degree. The body of the information is as follows:

"He, said Ole Harsted, in the county of King, state of Washington, on the 6th day of March, 1911, did then and there wilfully, unlawfully and feloniously make an assault upon the person of one Virgil Cooper, a male person, with intent then and there to commit the crime of sodomy upon said Virgil Cooper."

A demurrer to the information, upon the ground that it does not state facts sufficient to constitute a crime or misdemeanor, was overruled. This ruling is assigned as error. The information was drawn under the provisions of Rem. & Bal. Code, § 2414, subd. 6. It provides:

"Every person who, under circumstances not amounting to assault in the first degree, . . .

"(6) Shall assault another with intent to commit a felony . . . shall be guilty of assault in the second degree."

Sodomy is defined in Rem. & Bal. Code, § 2456. It is argued that, because the completed offense may be committed in more than one way, the precise facts constituting the attempt should have been set forth in the information. This argument might have merit if the appellant had been charged with having committed the crime of sodomy. It is obvious that one may be guilty of an attempt to commit the offense without the acts having proceeded far enough to indicate anything further than a general intent to commit the completed offense. Moreover, the crime is charged in the language of the statute, and that, subject to exceptions not applicable here, is sufficient. *People v. Williams*, 59 Cal. 397; *Honselman v. People*, 168 Ill. 172, 48 N. E. 304; *Kelly v. People*, 192 Ill. 119, 61 N. E. 425, 85 Am. St. 323; *State v. Ward*, 35 Minn. 182, 28 N. W. 192; *State v. Johnson*, 114 Iowa 430, 87 N. W. 279; *State v. Phelps*, 22 Wash. 181, 60 Pac. 134. The *Honselman* case is directly in point. *State v. Carey*, 4 Wash. 424, 30 Pac. 729, cited by the ap-

pellant, is not in point. In that case, Carey was charged with having practiced medicine without first having obtained a license. The information was held defective, in that it did not charge the acts which the statute makes definitive of the crime. *State v. Campbell*, 29 Tex. 44, 94 Am. Dec. 251, also cited by the appellant, supports his contention, but we do not desire to follow it.

Virgil Cooper, the boy upon whom the assault is alleged to have been made, testified that he was eleven years old, and that, after the arrest of the appellant, his throat and mouth were sore. While the boy was being detained, one of the juvenile officers informed the prosecuting attorney that he had reason to believe that the boy had siphilis. Acting upon this statement, the prosecutor had the appellant's bond increased. Later he had the boy examined by two physicians, who reported to him that the boy did not have that disease. These facts in reference to the siphilitic symptoms of the boy appear from the statement of the prosecuting attorney. Appellant's counsel thereafter offered to prove, that the county physician, "examined the boy and reported" that he had siphilis in the mouth; that the appellant's blood had been tested and "found free from exterior evidence of siphilis," and "found free from taint." His counsel further stated:

"I want to examine Dr. Hall and ask whether he has made a blood test of the boy to determine whether he has siphilis, . . . and whether he did report to any official that the boy had siphilis in the mouth. . . . If he had it, then he had been in the habit of committing the offense with other men. That is where we think its materiality rests."

The offer was denied by the court. It is argued in the brief, and was pressed with much earnestness at the bar, that this ruling was error. We cannot acquiesce in this view. There was no direct offer to prove that the boy had siphilis. Counsel merely wanted to show that such a condition had been reported, and further wanted to inquire of the physi-

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cian whether he had tested the boy's blood with a view of ascertaining whether it showed the presence of that disease. In proper cases the general reputation of a witness for immorality may be shown, but we think the better rule is that particular acts of immorality cannot be shown, either upon cross-examination or by the evidence of third persons, for the purpose of discrediting the witness. Cases may arise, however, where the evidence offered is of such a nature that it may be admitted within the discretion of the court. 2 Elliott, Evidence, § 978.

In two instructions the court admonished the jury that they should free their minds from prejudice and sympathy, "whether for the defendant or any other person;" and that they should, "bring to bear a judgment that is cool, calculating and sober, unaffected by any feeling of prejudice, uninfluenced by any feelings of sympathy, untrammelled by any anxiety or fear as to penalty." In criticism of these instructions, it is said that they reiterate the caution to the jury that they must determine the case, "freed from any of the mental processes by which human beings usually arrive at conclusions." We cannot think that the instructions are erroneous. It is certainly the duty of the jury to free their minds from passion, prejudice, and sympathy, and determine the case solely upon the evidence. In other words, it is the plain duty of the jury to determine the guilt or innocence of the accused from the evidence in the case, leaving the penalty, if any, to be adjudged by the court. This is not a case where by reiteration and emphasis the court indirectly gets before the jury its view of the facts. If it were, we would not hesitate to order a new trial.

There was no error in the failure of the court to instruct as to an assault in the third degree. There is no evidence calling for such instruction. The appellant was either guilty as charged or not guilty. The law does not warrant an instruction covering an included crime when there is no

evidence supporting it. *State v. Kruger*, 60 Wash. 542, 111 Pac. 769.

In defining a reasonable doubt, the court instructed the jury as follows:

"The burden is on the state of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt. It is not sufficient that the state should prove these facts by a mere preponderance of the testimony, nor, on the other hand is it necessary that they should prove conclusively in such manner as to leave room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty or a reasonable certainty, which may vary in degree, but rarely an absolute certainty. *The expression 'reasonable doubt' means in law just what the words imply,— a doubt founded upon some good reason.* It must not arise from a merciful disposition or a kindly sympathetic feeling, or a desire to avoid performing a disagreeable duty. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fair minded man might with reason entertain, consistently with a conscientious desire to ascertain the truth. You must use your common sense as men of experience, possessing some knowledge of worldly affairs, and if, after examining carefully all the facts and circumstances in this case, you can say and feel that you have settled and abiding conviction of guilt of the defendant, then you are satisfied of guilt beyond a reasonable doubt. If you have not such a conviction then you should acquit him."

The appellant confidently asserts that this instruction is erroneous and highly prejudicial. Specific exception is taken to the italicized words. The phrase "reasonable doubt" is so clear and exact that it may well be doubted whether an instruction has ever been formulated that served to either simplify or elucidate it. It means, however, if it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as

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distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given and one for which a good reason can be given. When a cause has been submitted to a jury, it retires to its room for the purpose of consultation, discussion, and deliberation. These precede the verdict. In practice, it is known that verdicts are sometimes reached only after long and acrimonious debate in the jury room. While it is true, as argued, that the jury is not required to report to the court a reason for its verdict, it is equally true that, in the consideration of the evidence, one juror has a right to call upon another for a reason for his faith. The very word "deliberation" presupposes a painstaking and conscientious purpose upon the part of each juror to weigh the evidence in order that an intelligent verdict may be reached. If discussion and an interchange of views upon the evidence were not contemplated, the law would dissolve the jury after one unsuccessful ballot. Discussion tests the reasonableness of the conflicting views of the jurors, and weeds out fanciful and imaginary doubts.

In one of the cases relied upon by appellant, *Siberry v. State*, 133 Ind. 677, 33 N. E. 681, an instruction that "a reasonable doubt is a doubt which has some reason for its basis" was condemned as erroneous. The court said:

"It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt, with the certainty which the law requires, before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case."

We cannot agree with the learned court's deduction. The duty always rests upon the state of satisfying the minds of the jury beyond a reasonable doubt of the guilt of the accused. The question is, what constitutes such a doubt. The instruction has been sanctioned by this court. *State v. Harras*, 25 Wash. 416, 65 Pac. 744. A similar instruction

was approved in the following cases: *Butler v. State*, 102 Wis. 364, 78 N. W. 590; *State v. Patton*, 66 Kan. 486, 71 Pac. 840; *Hodge v. State*, 97 Ala. 37, 12 South. 164, 38 Am. St. 145; *Vann v. State*, 83 Ga. 44, 9 S. E. 945; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493; *State v. Jefferson*, 43 La. Ann. 995, 10 South. 199; *Wallace v. State*, 41 Fla. 547, 26 South. 713; *State v. Serenson*, 7 S. D. 277, 64 N. W. 130; *State v. Morey*, 25 Ore. 241, 35 Pac. 655, 36 Pac. 573.

In the *Butler* case, the court said: "A doubt cannot be reasonable unless a reason therefor exists, and if such reason exists it can be given." In the *Patton* case an instruction defining a reasonable doubt as such a doubt "as a jury are able to give a reason for," was approved. In the *Hodge* case the court reversed the judgment for the refusal of the court to instruct at the defendant's request that "a reasonable doubt is defined to be a doubt for which a reason could be given." The *Serenson* case approves a like instruction. In the *Vann* case an instruction was approved which stated that "the doubt must be a reasonable doubt; not a conjured up doubt—such a doubt as you might conjure up to acquit a friend, but one which you could give a reason for." In the *Guidici* case an instruction in the following language was approved:

"You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty, it is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence. A doubt for which some good reason arising from the evidence can be given."

The court said, reading the instruction as a whole, that it only distinguishes a reasonable doubt from one which is merely vague and imaginary. In the *Jefferson* case a charge was sustained which defined a reasonable doubt as "a serious, sensible doubt, such as you could give a good reason for."

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Statement of Case.

The appellant has cited *Bennett v. State* (Ark.), 128 S. W. 851; *Siberry v. State*, *supra*; *Blue v. State*, 86 Neb. 189, 125 N. W. 186, and *Gragg v. State*, 3 Okl. Cr. 409, 106 Pac. 350. In these cases a somewhat similar instruction to the one at bar was condemned as being erroneous and prejudicial. We are impressed; however, with the view adopted by the cases first cited, and feel constrained to hold that the instruction is not erroneous. Other criticisms of the instructions are without merit, and require no separate consideration.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ.,
concur.

[No. 9613. Department One. December 5, 1911.]

E. S. SNELLING *et al.*, Respondents, v. D. C. BUTLER, as
Sheriff etc., Appellant.¹

HOMESTEADS—EXEMPTIONS—EXECUTION—TIME FOR FILING DECLARATION. Under Rem. & Bal. Code, §§ 532, 533, exempting a homestead from execution sale, except for judgments obtained on debts secured by mechanics' and vendor's liens and mortgages executed by husband and wife, an execution sale cannot be had upon a judgment entered upon unsecured promissory notes, where prior to the issuance of the execution, a declaration of homestead had been filed, although the judgment was entered prior to the filing of the declaration and became a lien subject to be defeated by such filing (FULLERTON, J., dissents).

Appeal from a judgment of the superior court for Wahkiakum county, Rice, J., entered January 11, 1911, in favor of the plaintiffs, in an action to enjoin an execution sale. Affirmed.

Willett & Oleson, for appellant.

N. H. Bloomfield and E. S. Snelling, for respondents.

¹Reported in 119 Pac. 3.

Gose, J.—This is an appeal from a judgment granting a permanent injunction against the sale of real property upon execution. The facts are as follows: On August 12, 1909, one Bailey obtained a judgment against the respondents, in the superior court of Wahkiakum county, for \$350, with interest and costs. The respondents then owned, and with their two minor children resided upon, lots 6, 7, and 8, in block 6, of the town of Athens, in that county. On September 14, 1910, the respondents executed and filed their declaration of homestead upon the property, conformably to the statute. Two days later, the judgment creditor caused a writ of execution to issue for the enforcement of the judgment. The writ was placed in the hands of the sheriff of that county, who levied upon the property and advertised its sale. The answer admits that the property is of less value than \$2,000. The judgment was entered upon the respondents' unsecured promissory note. The debt is not secured by mechanics', laborers', materialman's, or vendors' liens upon the premises.

Upon these facts, the appellant asks for a reversal of the judgment, under the authority of *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153. We do not think that case has any application to the case at bar. In that case a married man executed a mortgage upon his separate real estate to secure the payment of a contemporaneous loan. Later the wife filed her declaration of homestead under the provisions of Rem. & Bal. Code, § 530. In discussing the case, we said, in substance, that, under the statute, the homestead is brought into being by the filing of a homestead declaration, and that it exists and speaks from that time only and has no retroactive force. We adhere to that view of the law. This case is controlled by other provisions of the statute. Rem. & Bal. Code, §§ 532, 533, provide:

"§ 532. The homestead is exempt from execution or forced sale, except as in this chapter provided.

"§ 533. The homestead is subject to execution or forced

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sale in satisfaction of judgments obtained: (1) on debts, secured by mechanic's, laborer's, materialmen's or vendor's liens upon the premises. (2) On debts secured by mortgages on the premises executed and acknowledged by the husband and wife or by any unmarried claimant."

The judgment became a lien upon the property subject to the right of the owners to defeat an execution sale by the filing of a homestead declaration. They filed the declaration before the issuance of the execution. When the declaration was filed, the property became a homestead and, as such, it was exempt from execution or forced sale. The *Hookway* case was controlled by the provisions of Rem. & Bal. Code, § 533, and subsequent sections of the statute. Sections 532 and 533, when read together, so clearly protect the homestead in the case at bar that discussion and argument seem unnecessary. Art. 19 of the constitution provides that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." The first section of the statute quoted was enacted in obedience to that command.

The judgment is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

FULLERTON, J., dissents.

[No. 9640. Department Two. December 5, 1911.]

JAMES E. DEMPSEY, *Respondent*, v. UNITED WIRELESS
TELEGRAPH COMPANY, *Appellant*.¹

CORPORATIONS — REPRESENTATIONS — AUTHORITY OF AGENTS—EVIDENCE—SUFFICIENCY. A general fiscal agent and a director of a company has no implied authority to employ brokers to sell stock of the corporation upon a commission; and in the absence of any evidence of authority or of the nature of the business of the company or his connection with it, it is not liable on his agreement to pay a broker's commission on stock sold, especially where it does not appear that the stock sold was the stock of the company.

¹Reported in 119 Pac. 1.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 16, 1911, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Reversed.

E. B. Palmer and *Thos. M. Askren*, for appellant.

McClure & McClure, for appellants Trustees in Bankruptcy.

William C. Keith, for respondent.

MORRIS, J.—This is an action to recover commissions upon two sales of stock of the appellant. Recovery was permitted upon one sale and denied as to the other, and the company appeals.

In November, 1909, respondent was employed by George H. Parker as an agent to solicit the sale of stock in the appellant company. He saw one Fred Cavanaugh, residing near Kent, and endeavored to induce him to purchase. He made several visits to Fred Cavanaugh, and was finally told by Fred Cavanaugh that he was favorably impressed, but that he was not in a position to buy stock, and would refer the matter to his father, then at San Jose, California. Fred Cavanaugh wrote to his father concerning the stock, sent him some literature issued by the company, and also a letter he had received from Parker, in which letter Parker strongly urged the purchase of this stock. Fred Cavanaugh seems to have been his father's financial agent in many respects, but in this matter he wished his father to act upon his own responsibility. After this communication to the father at San Jose, respondent took Fred Cavanaugh to the company's office at Seattle, and there had a talk with Parker in which Fred Cavanaugh repeated what he had told respondent, that he would do nothing upon his own responsibility, but would wait until he had heard from his father. Just before Christmas, respondent saw Fred Cavanaugh again, and was told that he had heard from his father, and

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that the father thought it a good proposition, but had not advised him about the taking of any stock.

Nothing more is shown by the record until about June 1 M. L. Cavanaugh, the father of Fred Cavanaugh, returned to his home near Seattle, and walking into the office of the appellant, at Seattle, informed those in charge that he had purchased one hundred and ten shares of stock while in California, and wished to make some arrangements as to its transfer. When or from whom this stock was purchased does not appear. After M. L. Cavanaugh left the office, a Mr. Carr, another selling agent of appellant, was called in and instructed to call on M. L. Cavanaugh and endeavor to sell him additional stock. Carr had accompanied respondent on one or two of his visits to Fred Cavanaugh, and it had been arranged between them, if they succeeded in making a sale, they would divide the commission.

At the time M. L. Cavanaugh returned to Seattle with this stock, Fred did not know that he had purchased any stock while in California, nor did he know of his return until some days afterwards. Carr called on M. L. Cavanaugh, and finally induced him to purchase one hundred shares of stock at \$35 per share, providing he could trade in some notes and mortgages for the purchase price, which was consented to and the sale made. Thereafter respondent demanded a commission on both sales, and being refused, brought this action, in which the court denied him any commission upon the purchase in California, but awarded him judgment for the amount of his commission upon the second sale. It might be added that he brought the action against both George H. Parker and the company. Parker was, however, dismissed in the court below.

The errors assigned are that it is not shown that Parker had any authority to bind the company, that respondent was not instrumental in procuring the last purchase, and that the stock sold was the stock of Parker. Unless the record shows authority on the part of Parker, the case must fail,

as all the transactions upon which recovery is based are had with either Parker or his agents. We have read the record carefully, and it is absolutely silent as to any authority Parker had to bind the company, to appoint agents, or to pay commissions for the sale of its stock. There is neither any express nor any implied authority shown, nor does it appear just what is the relation between Parker and the company. The only testimony in the record upon that question is this:

"Q. Now, this office of the company in Seattle was the main office on the Coast here, wasn't it? That is, the headquarters? A. Yes. Q. That is where all of the final business was transacted? A. I don't know what you mean by that. Q. Well, this was the head office for the Pacific Coast, headed by Mr. Parker? A. Yes, sir. Q. And he was the general agent of the Wireless Telegraph Company as well as one of the trustees of the company? A. He was the general fiscal agent of the company and one of the directors, I believe. Q. And he had the right and authority to sell stock? A. Why, I presume so. Q. And he had the right and authority to employ agents? A. Why, I believe so. I am not certain. I do not know anything about his authority."

This testimony was given on cross-examination by Mr. Martin, who seems to have been in charge of the Seattle office under George H. Parker. All that we can gather from it is that Parker was the general fiscal agent of the company, and one of its directors. Just what the duties of a general fiscal agent and a director are in this company does not appear, and we cannot assume that Parker's authority from the company was such that his actions in this matter would bind the company. It was an issue in the case, and it should have been proved and not left to assumption nor presumption. Appellant's contention here is that a general agent's authority to bind his principal through a sub-agent depends, in the absence of proof of express authority, upon the nature of the business he is transacting, and that it may be implied and is implied when the nature of the busi-

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ness requires the implication. There is nothing in this record as to the nature of the business of the appellant, nor as to the nature of Parker's duties as fiscal agent or director, and we cannot assume his authority from such a description. The appointment of respondent is signed "United Wireless Tel. Co." Underneath appears the name "Geo. H. Parker." This was the basis of respondent's claim that he was acting for both the company and Parker. He says it was given him by Parker. If so, it would prove authority from Parker, but it could not prove authority from the company to Parker. If we could find any evidence to justify an assumption that the stock included in the last sale was the stock of the company and not the stock of Parker, or could find any evidence of a benefit to the company from the sale, or of its ratification, the case would be easier upon the theory of implied authority. But there is no such evidence. On the contrary it would appear that the company had no part in the transaction and that Parker was dealing in his own stock. On June 6, when the notes and mortgages which were to be exchanged for the stock were delivered at the Seattle office, the following receipt was given M. L. Cavanaugh:

"Received of Mr. Cavanaugh note & mtg. for 1000 (Geo. D. Farwell) dollars.

"Note & mtg. for 1000 C. E. Rigby.

"Note & mtg. for 1200 Alex McLush, for examination. Also five abstracts covering above property.

"Geo. H. Parker, per J. M. Martin."

On June 15, when it had evidently been determined to accept the notes and mortgages in exchange for the stock, Parker gave the following receipt:

"Received of M. L. Cavanaugh payment in full for 100 shares of the preferred stock of the United Wireless Telegraph Co., same to be delivered as soon as received from home office.
Geo. H. Parker."

These receipts would seem to indicate that they were

dealing with Parker's stock, and not the stock of the company. They would at least be no proof that the stock was that of the company. We therefore hold that, in the face of the issue raised, the respondent has failed to prove that he had any contractual relation with the appellant, and for this reason his action must fail. *Shavaliar v. Grand Rapids Bark & Lumber Co.*, 128 Mich. 280, 87 N. W. 212; *Carroll v. Manganese Steel Safe Co.*, 111 Md. 252, 73 Atl. 665; *Kalina v. Robert Gair Co.*, 125 N. Y. Supp. 1040. Having reached this conclusion upon the first and third assignments of error, it is not necessary to discuss the second.

The judgment is reversed, and the cause remanded with instructions to dismiss.

CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9648. Department Two. December 6, 1911.]

G. Y. SAKAI, *Respondent*, v. H. G. KEELEY, *Appellant*.¹

JUDGMENT — VACATION — JURISDICTION — AFFIDAVIT OF MERITS. A motion to vacate a judgment void for want of jurisdiction need not be supported by an affidavit of merits.

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS. An appeal from an order denying a motion to vacate a default judgment, which appears to have been heard on affidavits, will be dismissed where the affidavits were not brought up by a bill of exceptions or statement of facts; and it is not sufficient that the defendant's affidavit was attached to and made a part of the motion, where the transcript shows that there was at least one other counter affidavit considered.

APPEAL—REVIEW—CORRECT DECISION ON INCORRECT GROUND. Where the record on appeal is insufficient to secure a review of an order denying the vacation of a judgment, error cannot be predicated on the fact that the order recited an insufficient legal reason for denying the motion.

Appeal from an order of the superior court for King county, Sheeks, J., entered January 27, 1911, denying a

¹Reported in 119 Pac. 190.

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motion to vacate a default judgment, after a hearing before the court on affidavits. Appeal dismissed.

H. L. Smith (R. B. Brown, of counsel), for appellant.

Hamlin & Meier, for respondent.

CHADWICK, J.—A default judgment was entered against the defendant H. G. Keeley, on the 26th day of February, 1910. This came to his notice on July 25, 1910. On December 10, 1910, defendant appeared specially, and moved that the order of default be set aside, and that the judgment be vacated because entered without service of process and therefore lacking in the element of jurisdiction over the person of the defendant. The facts showing a want of personal service were set forth in an affidavit accompanying the motion. The matter came on for hearing before Honorable Mitchell Gilliam, who denied the motion upon the ground that it was not accompanied by an affidavit of merits, but gave leave to file another motion and an affidavit setting forth the merits of defendant's case.

The ruling that a motion going to the vacation of a judgment void for the want of jurisdiction over the person should be supported by an affidavit of merits is contrary to the settled practice in this state. *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123. But the error is not now material.

Thereafter defendant filed another motion, and supported it by a like affidavit showing a lack of service and a show of merit. Because of the congested state of the docket, this motion was heard by Honorable Ben Sheeks, a visiting judge, who denied the motion and entered an order the material parts of which follow:

"Said cause was tried and heard upon the motion of the defendant H. G. Kelley, filed in this court on the 31st day of December, 1910, and the evidence of the respective parties

being adduced and heard and the court being fully advised in the premises;

"It is hereby ordered that said motion be and the same is denied for the reason that the matters therein have been heretofore adjudicated against defendant H. G. Kelley. To which said order defendant Kelley excepted, and exceptions allowed."

Defendant brings this case here upon the motions and affidavits mentioned. His affidavits are met by a motion to dismiss his appeal, upon the ground and for the reason that there is no statement of facts settled or certified by the court, whereas it appears affirmatively that the trial judge heard and considered "the evidence of the respective parties . . . , and the court being fully advised in the premises." It is the contention of the appellant that, inasmuch as the affidavit of merits is attached to his motion, referred to and thus made a part thereof, it becomes a part of the record within the rule announced in *State v. Vance*, 29 Wash. 435, 70 Pac. 34, and *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487. The *Vance* case announced the doctrine that, notwithstanding the court had held that evidence in the form of affidavits must be brought to this court in the form of a statement of facts or a bill of exceptions, an affidavit attached to and made a part of the motion by reference would, when included in the transcript, be considered as evidence without being so certified by the court. While the reasoning of the court in that case is, in the judgment of the writer and other members of the court as now constituted, without foundation, the case has since been followed by reference in the case of *Chevalier & Co. v. Wilson*, *supra*, *Richardson v. Richardson*, 43 Wash. 634, 86 Pac. 1069, and in the more recent case of *Spoar v. Spokane Turn-Verein*, 64 Wash. 208, 116 Pac. 627, and it being a question of practice rather than of principle, the court is not disposed to overrule it.

But taking that case and the cases depending upon it at their full worth, they do not, in the light of the record, bring aid and comfort to the appellant. The transcript

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shows that there was at least one affidavit—a counter affidavit—which must have been considered by the court at the time of the last hearing, and was no doubt a part of “the evidence of the respective parties.” This affidavit and other evidence, if any, is not properly before us, and not having a complete record, the case falls within the long line of cases some of which are cited in the case just referred to.

In the *Spoar* case the court limited the rule of the *Vance* case to the “attached” affidavit, saying that:

“It is patent, from the recital in the order, that the respondent presented to the court more than one affidavit, and that the court reached its conclusion from reading all the affidavits offered by the parties. . . . The rule there announced [in the *Vance* case] applies to the affidavit referred to in the case at bar, but has no application to the other affidavits.”

To the authorities cited in these cases, the following may be added: *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873, where the disposition of the court to limit, rather than extend the doctrine of the *Vance* case, is clearly intimated. See, also, *Gray v. Granger*, 48 Wash. 442, 93 Pac. 912.

Nor do we think we should be bound by the expression in the judgment to the effect that the motion was denied for the reason that the matters therein suggested had been theretofore adjudicated against defendant. It may be admitted that the court overruled the motion for that reason improperly, but it does not follow that, in the evidence of the respective parties, a sufficient reason to sustain the judgment would not be found if the evidence were properly before us.

Motion to dismiss allowed.

ELLIS, CROW, and MORRIS, JJ., concur.

DUNBAR, C. J., concurs in the result.

[No. 9769. Department Two. December 6, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
C. E. MCKINNEY, *Appellant*.¹

CRIMINAL LAW—APPEAL FROM JUSTICE COURT—COMPLAINT—AMENDMENT—HARMLESS ERROR. On appeal from justice court, an order purporting to amend the complaint upon which the accused was tried in justice court, will not be held to deprive the accused of any substantial right, where the complaint had been amended in justice court by agreement before plea thereto, and accused was actually tried on the same charge as in the justice court, and the defendant pleaded not guilty after the so-called amendment.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered January 17, 1911, upon a trial and conviction of assault. Affirmed.

R. S. Lambert and Brown, White & Peringer, for appellant.

Frank W. Bixby and H. C. Thompson, for respondent.

CHADWICK, J.—Defendant was convicted in the court below, on December 28, 1910, of assault in the third degree. On July 5, 1911, the court reciting that “this order is made in lieu of and to correct an erroneous order as drawn on the 27th day of December, 1910, said order so drawn not being signed by the court,” made and entered an order purporting to amend the complaint theretofore filed in the justice court, and from which an appeal had been taken from a judgment of conviction. The material parts of the order follow:

“Strike the words ‘and feloniously’ and insert the word ‘and’ between the words ‘wilfully’ and unlawfully.’ After the word ‘assault’ in the same line insert the words ‘and beat.’ Strike the word ‘with’ and insert in lieu thereof the following, ‘by then and there striking and beating him with his hands and;’ also by striking the words ‘to wit, a police club;’ also striking the words ‘the said police club being then

¹Reported in 119 Pac. 179.

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and there a thing likely to produce bodily harm' and inserting in lieu thereof 'and a more particular description of which weapon is to this complainant unknown.' It is therefore ordered that the said motion to amend the said complaint herein, or affidavit for arrest, by interlineation is granted and said amendment is made."

Defendant had been charged in the justice court with the crime of assault in the second degree. The transcript of the justice court, which is made a part of the record, recites that defendant, upon being brought to bar and informed of the charge, entered a plea of not guilty, and that later, the case being called for trial, defendant being then present, "by agreement complaint is amended to show defts. true name, C. E. McKinney, and deft. is to be tried on a charge of assault in the third degree." It is now contended that, under the rule announced in the case of *State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461, which was followed in the case of *State v. Hamshaw*, 61 Wash. 390, 112 Pac. 379, because of the order of the superior court allowing an amendment to the complaint, the court lost jurisdiction to proceed and the defendant is entitled to be discharged.

The rule upon which the two cases cited is founded is well sustained in reason, and is supported by the greater weight of authority, and, but for the prior proceeding, would control this case; for the form of the order as quoted is in itself an unanswerable argument in favor of certain and orderly procedure in courts of record. But, as intimated, we think that the objection here goes to matters of form rather than of substance. The amendment was not made in support of a new or different charge, but to make the record conform to the actual proceeding in and the charge upon which defendant had in fact been tried in the justice court. The order of December 27, as evidenced by the order of July 5, was a useless thing, for defendant was actually tried upon the same charge as in the court below. Furthermore, although we do not now decide it to be so, it is likely that the vice

sought to be overcome in the *Van Cleve* and *Hamshaw* cases, that is, the deprivation of the right to make formal plea to a new or amended charge, would not in any event be held to have occurred in the case at bar, for the record shows that defendant pleaded not guilty after the so-called amendment. It is our judgment that defendant has been deprived of no substantial right, and that the judgment of the lower court should be affirmed.

Judgment affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9916½. Department Two. December 6, 1911.]

HARRY KRUTZ, *Appellant*, v. F. L. DODGE *et al.*,
Respondents.¹

APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR. Where plaintiff, in proceedings to register a title under the Torrens act, moved a dismissal without prejudice, which was granted except as to a specified portion of the relief, on appeal by the plaintiff, error in denying registration, which was unappealed from, cannot be reviewed.

RECORDS—REAL ESTATE—REGISTRATION UNDER TORRENS ACT—PROCEEDINGS—RIGHT TO DISMISSAL. The superior court has no jurisdiction to try out conflicting titles and refuse the applicant a dismissal without prejudice, in a special proceeding to register land titles under the Torrens act, the act having provided (Rem. & Bal. Code, § 8834) that the superior court shall dismiss the proceeding if the title is not a proper one for registration which dismissal may be without prejudice, and that the applicant may dismiss at any time on terms fixed by the court, and *Id.*, §§ 8809 and 8823, providing for the registration only of such titles as are found to be in the applicant, with admitted liens or outstanding interests, and that the applicant proceeds at his peril if there are hostile or conflicting interests.

APPEAL—REVIEW—PREJUDICIAL NATURE OF ERROR. Error in refusing a dismissal without prejudice as to all the lands sought to be registered under the Torrens act cannot be said to be harmless

¹Reported in 119 Pac. 188.

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merely because the title to the land was not adjudicated, the statute requiring the court to enter a dismissal without prejudice when asked for.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 2, 1911, upon findings in favor of the interveners, dismissing a proceeding to register the title to land under the Torrens law. Reversed.

Frank C. Park (*H. D. Moore*, of counsel), for appellant.

Fred H. Peterson, *Philip D. Macbride*, and *John S. Jurey*, for respondents.

CHADWICK, J.—Plaintiff instituted a proceeding to register his title to certain property under the Torrens law. Defendants Humphrey and wife and Anna F. Doran intervened, claiming that a certain strip of ground, ten feet wide and a part of the land declared by plaintiff to be his own, had become, by common user and implied dedication, a public thoroughfare, and that the remainder of the block, in which the property of all the parties hereto except the city of Seattle was situate, had been conveyed by the common grantor with reference to the ten-foot strip, which he had intended to be an alley; and they made prayer accordingly. The defendant city answered, setting up certain local assessments upon the land in controversy, and asking that they be declared liens upon it. Issue being joined and trial had, the case was taken under advisement, and the trial judge having intimated that he would find for the interveners, plaintiff moved a dismissal of this proceeding, which was granted. Thereafter interveners moved a vacation of the order of dismissal, upon the ground that no notice had been given of the previous order. Thereafter plaintiff moved that the court make an order registering his title to all the land described. This motion was denied; whereupon plaintiff moved for a dismissal of his proceeding without prejudice and with costs to the interveners. This being denied, the court, upon

interveners' motion, dismissed the proceeding, finding, however, that the ten-foot strip was in fact an alley, and as to it the order of dismissal was with prejudice. From this order, an appeal is prosecuted.

Whether appellant was entitled to have his title registered, we will not now inquire, as an order denying his application was not appealed from, but was followed by a motion to dismiss generally. Appellant has thus fixed his status, and the only question left open is, whether the court could qualify its judgment of dismissal by barring a further proceeding at law or in equity as to the ten-foot strip.

The Torrens act makes provision for a special proceeding, and while there can be no doubt of the position taken by respondents that the superior court is one of general jurisdiction, and that its judgments duly rendered upon matters properly before it are conclusive, it does not follow, as is contended by them, that the court is given full power and jurisdiction to hear and determine all matters which may arise upon an application for registry of land titles under the Torrens law. It is true, as stated, that the act provides (Rem. & Bal. Code, § 8813), that the application shall be made to the superior court of the state of Washington. But the court is not thus given power to go beyond the terms or necessary intendments of the act it is called upon to administer. In a special proceeding, it being within the power of the legislature to limit the jurisdiction of the court, the bounds of the court's jurisdiction are to be found in the limitations of the act under which its jurisdiction is invoked. The legislature might have provided for a determination of conflicting interests if it had been so inclined. But it did not do so. On the contrary, after providing an elaborate procedure, it is provided:

"If, in any case, after hearing, the court finds that the applicant has not title proper for registration, a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may dis-

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miss his application at any time, before the final decree, upon such terms as may be fixed by the court, and upon motion to dismiss duly made by the court." Rem. & Bal. Code, § 8834.

It would seem that this statute needs no construction. It says that the court shall, if for any reason the title is not a proper one for registration, dismiss the proceeding; and also gives an absolute right to the appellant to dismiss upon terms. What may be a title proper for certification is made plain by reference to §§ 8809 and 8823, Rem. & Bal. Code, both of which tend to show that it was the intent of the act to provide for the registration of only such titles as were found to be in the applicant, with such liens or outstanding interests as he was willing to admit; and if there was a hostile or conflicting interest, the title would not be certified forthwith, although the appellant could proceed at his peril, and upon the hearing show that the apparently adverse interests were not in fact real, or he might take his discharge and clear his title in an independent action. It is clear that the legislature did not intend that existing remedies at law and equity should be superseded. Otherwise the section quoted or referred to and a provision for discharge are but idle formulae.

Under a statute identical in terms the supreme court of Colorado held that no affirmative relief would be granted to a defendant in a proceeding under the Torrens act.

"The further contention is that the act is not due process of law in that it fails to provide for an affirmative judgment in favor of a defendant, the only decree permissible being one of dismissal in case the court, after hearing, finds that the applicant has not title proper for registration. The act does accord to all persons equal rights and privileges. Any one desiring to avail himself of its terms can do so by filing his application, and can obtain the registration of his title by complying with the requirements of the statute. Although the legislature has seen fit to allow affirmative relief only to the applicant who initiates the proceeding, this does not render the proceeding objectionable for the reason as-

signed. The right to a particular remedy is not a vested right. Every state has complete control over the remedies which it offers to suitors in its courts.—Cooley's Const. Lim. 515." *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 Pac. 949.

So, in *McQuesten v. Commonwealth*, 198 Mass. 172, 83 N. E. 1037, it was held:

"It is plain that in this enactment [Idem, § 8834, Rem. & Bal. Code] the legislature did not adopt or intend to adopt either the rule of the common law or that which obtains in equity. . . . The view taken of an application for registration and confirmation of title . . . which led to an absolute right of withdrawal before final decree, . . . appears to be this: Such an application is not, primarily at any rate, the beginning of a controversy between party and party. If such an application is filed, a controversy may and in many cases will result. But the primary object of such an application is to get a certificate of title to the petitioner's land which has the attributes in substance, for practical purposes, of a certificate of title to a share in the capital stock of a corporation. And, treating the application as an application to bring the locus within the new system, if, at any time before the land has been brought within the operation of it, the petitioner changes his mind and on the whole concludes that he prefers to leave his title as it was before the Torrens system was adopted, he shall be at liberty to do so."

See, also, *Foss v. Atkins*, 201 Mass. 158, 87 N. E. 189; *Id.*, 204 Mass. 337, 90 N. E. 578.

But it is said that, under the Massachusetts law, the title is not determined by a court of general jurisdiction, but by a land board exercising no juridical functions. This may be admitted, but it does not destroy the reasoning upon which the decisions are made to rest; that is, that the procedure is a voluntary one and its limitations, as well as the power of the tribunal administering it, are to be found in the act itself and not by reference to the general rules of law. Nor can we agree with the contention that the provision of the law providing for a dismissal without prejudice implies that it

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may be with prejudice when a motion for voluntary dismissal is made, nor that the right to impose terms implies a right to fix a condition. By the last clause of the statute, § 8834, the absolute right of dismissal is reserved to the applicant. Had it been the intent of the law makers to provide for a voluntary dismissal, with or without prejudice, we may assume that, having used the word with reference to dismissal by the court, the legislature would have done likewise when providing for a dismissal on motion of the party. It did not do so, but used the word "terms." This word has a meaning which is generally accepted when used in connection with judgments and judicial proceedings. It is that the court may impose such penalty as will save the opposing party harmless from pecuniary loss, and which can be satisfied by the payment of a fixed sum of money.

Finally, it is contended that no prejudice has resulted to appellant because the decree as entered does not deny appellant's title in the alley. This may be technically true, but appellant is entitled to an order of dismissal under the statute, and is not to be compelled to take a measure of relief less than it affords, which is a dismissal as to all the land described. It is not merely a question of dismissal, but a question of power in the court. There is more or less difference in the Torrens acts as adopted in the several states. Where, as in Illinois, no provision is made for a voluntary dismissal, but the court is put to a final determination of the issue, it has been held that the court may grant relief as to such portion of the land as the evidence shows the title in fee to be in the applicant, and deny it as to the remainder. *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80. But our law was drawn upon a different theory.

For these reasons, the judgment of the lower court is reversed, and the cause remanded with instructions to enter an order of dismissal.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9738. Department Two. December 6, 1911.]

EDWIN T. MAUK, *Appellant*, v. P. P. LEE *et al.*,
Respondents.¹

PRINCIPAL AND AGENT—AUTHORITY—POWER OF ATTORNEY—CONSTRUCTION. A power of attorney for the transaction of the business of a firm, and to be "my personal representative in . . . any other matters that may arise during my absence demanding personal attention," authorizes the agent to conclude negotiations relating to a sale outside of the firm business, especially when construed in connection with correspondence relating to the subject.

VENDOR AND PURCHASER—CONTRACT—RESCISSION BY VENDEE—TENDER—EVIDENCE—SUFFICIENCY. Under a contract of sale making time of the essence, in which the vendor agreed to furnish an abstract of title and deed within a specified time, the purchaser is entitled to rescind the contract where he made demand for the deed and tendered the purchase price to the vendor's authorized agent, the vendor being abroad, at the time fixed, and no deed or abstract was furnished until four days after demand and after notice of rescission.

SAME—RESCISSION BY VENDEE—CONDITIONS PRECEDENT. Neither the recording of the assignment of a contract for the purchase of land, nor the tender of a quitclaim deed, are conditions precedent to a rescission of the contract on account of the default of the vendor in furnishing an abstract and deed.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered April 15, 1911, upon findings in favor of the defendants, in an action to rescind a contract and recover money paid, after a trial on the merits before the court without a jury. Reversed.

Solon T. Williams and *William H. Heaton*, for appellant.
C. A. Swartz and *Hans Bugge*, for respondents.

DUNBAR, C. J.—This is an action brought by the appellant, Edwin T. Mauk, against P. P. Lee and wife, respondents, for the purpose of recovering the sum of \$800 and interest, paid as part payment on the purchase of certain lots

¹Reported in 119 Pac. 185.

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in the city of Bellingham, and is based on an alleged rescission of the contract of purchase. The respondents denied both the fact of the alleged rescission and the appellant's right to rescind, and asked for judgment in accordance with the written contract. The appellant demanded a jury, which was denied by the court, and the cause was tried to the court, resulting in findings, conclusions, and decree in favor of the respondents, the defendants below.

The contract was entered into between P. P. Lee and wife and one Hilda Hansen, whereby respondents agreed to sell to said Hilda Hansen, or her assigns, and said Hilda Hansen agreed to buy, certain real estate, located in the city of Bellingham, for the sum of \$3,800. Under this contract, Hilda Hansen paid to the defendants, at the time of its execution, the sum of \$800, and agreed to pay the balance on the 10th day of August, 1910, and the respondents agreed to deliver to said Hilda Hansen on said day a warranty deed to said land, with an abstract showing good title in respondents, and time was specifically made of the essence of the contract. A few days after the execution of the contract, it was assigned by Hilda Hansen to the plaintiff in this action, the appellant here, who ever since has been and now is the holder of the same.

Shortly after entering into the contract, the respondents left for an extended trip through Europe, leaving their business in charge of one C. P. Lee, a brother of respondent P. P. Lee. On the 10th day of August, 1910, appellant, accompanied by his attorney, W. H. Heaton, went to the office of the respondent P. P. Lee, made inquiries concerning the deed which he was to receive and an abstract of title to said land, and was referred to C. P. Lee, as the agent for said P. P. Lee. He saw C. P. Lee and made a demand for the deed and abstract. He was informed by Mr. Lee that the papers were at the office of Messrs. Bugge & Swartz, who were attorneys for P. P. Lee. He and his attorney accompanied Mr. Lee to the office of Bugge & Swartz, where the

appellant again demanded the deed and the abstract, and according to his testimony, tendered the purchase price. The tendering of the purchase price is denied by the respondents, but it is admitted that he demanded the deed and abstract, and we think it is not too much to say that, under all the testimony, it was understood that he was ready to pay the amount due on the contract. He was there told by one of the firm of lawyers—Mr. Swartz—that he knew nothing about the abstract; that he would try to get into communication with his partner Mr. Bugge and ascertain its whereabouts, and if it had not been made, he would immediately order the abstract made. The appellant was then prevailed upon to wait until the following morning to see if the abstract could be obtained, but it was distinctly understood, and this is admitted, that there was no advantage to be obtained by delay. The next morning he called at the office of Mr. C. P. Lee, and again demanded the deed and abstract, and made a tender of the money due. Mr. Lee informed him that he knew nothing more about the matter than he did the day before, and asked him to go down to the office of Bugge & Swartz again with him, which the appellant declined to do. Appellant then made tender of the money and, upon the deed and abstract not being forthcoming, elected to rescind the contract, and notified Mr. Lee that he would and had rescinded it, and demanded the money paid on the contract; and in due time this action was brought for the recovery of the amount paid, with interest on the same.

We are not able to reach the same conclusion that the trial judge did as to the equities of this case. There is unfortunately a very sharp conflict in the testimony; but we think that there is sufficient uncontradicted testimony to establish the right of the appellant to a rescission of the contract and the recovery of the money claimed. The court found the facts practically as we have set them forth in the statement, but found that the office of Bugge & Swartz was the proper place in which to transact business, and that plaintiff

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had notice of that fact. It also found that, at the time of the attempted rescission by plaintiff, he did not in any manner tender to defendants any reconveyance of said premises to place them *in statu quo*; that it was the duty of the plaintiff, and a condition precedent to rescission, to, at his own expense, record the assignment to him from Hilda Hansen, and to execute and record, or offer to record, his own reconveyance to defendants; that the plaintiff did not record said assignment until after he had received written notice from defendants that they were ready and willing to perform as to all matters about which the plaintiff complained; that no reconveyance was offered, nor any notice of such offer or tender given defendants or their attorneys until after the trial of the cause, and that the quitclaim tendered at the trial was not executed until after the commencement of the action.

The court further found that the defendants procured such abstract of title with all possible diligence after demand therefor on the 10th day of August, 1910, and that plaintiff received notice in writing of defendants' readiness and ability to perform according to the tenor of such written contract, prior to the time plaintiff caused his assignment from Hilda Hansen to be recorded, prior to any tender or offer of reconveyance to remove the cloud from defendants' title, and prior to his having placed the defendants in default under said contract. The court concluded that the defendants were entitled to recover their costs and disbursements; found that C. P. Lee, prior to the defendants' departure for Europe, was given a power of attorney in writing to act for P. P. Lee, but that such power related only to transactions of the firm of P. P. Lee & Co., and did not include authority to act with reference to the transactions involved in this case, except to deliver the papers to Bugge & Swartz who were said defendants' agents for such purpose.

This finding of the court, which is an important finding, we think is not sustained by the record; at least, not by the

construction that we place upon the power of attorney which is an exhibit in the case, and on letters written by the respondent P. P. Lee which we will notice hereafter. The power of attorney is too long to be set out in detail; but, after appointing C. P. Lee attorney for the transaction of business of the firm to which P. P. Lee belonged, and mentioning what business of the firm was to be performed, the instrument continues, "to be my personal representative in any and all matters or transactions with reference to said firm or said business, or any other matters that may arise during my absence demanding my personal attention," with limitations prescribed; expressly negating the idea that the appointment was made and authority conferred with reference only to the firm business, and showing conclusively that the said C. P. Lee was authorized to transact other business than the firm business.

That that was the construction placed upon this power of attorney by the parties themselves, is shown by the correspondence between them. C. P. Lee testifies that he had frequent conversations with Mr. Mauk, the appellant, concerning this business; that at one time Mauk asked him to write to his brother and ask him if he could get an extension of time, stating that he—Mauk—would pay for the cablegram if his brother would answer immediately. In none of these prior conversations was Mr. Mauk referred to the firm of Bugge & Swartz, but it seemed to be a mutual understanding that C. P. Lee was the authorized agent as far as this land business was concerned. Mr. Lee did write to his brother, as he says, in accordance with the request of Mauk, but meeting Mauk a few days afterwards he informed him that, while the brother had not answered his communication in respect to the application for time because not sufficient time had elapsed, yet he was satisfied from what his brother had written to him concerning other matters and concerning the expenditure of his money, that he would not grant the extension and wanted the money

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promptly paid. This is denied by the appellant Mauk; but, conceding it to be true, it is difficult to see in what way it would reflect on Mauk's interest in this matter. It would rather tend to the view that, after Mauk had been informed that he could not get the extension, he set himself to work to raise the money to meet the requirements of the contract. However, in a letter from Norway, dated July 27, 1910, written by the respondent to his brother C. P. Lee, in referring to this transaction, he said: "You must get the \$3,000 from Mauk, and then I want you to take \$3,000 more to pay the smallest one," referring to some notes he owed. Again he said: "If Mauk has not paid the contract, I want same advertised and foreclosed at once;" and there were other excerpts from letters bearing on this question, tending to show conclusively that C. P. Lee, and not the attorneys, Bugge & Swartz, was the agent of P. P. Lee in relation to this matter, and that Bugge & Swartz were employed only to do the legal part of the business, viz., to prepare the deed and see that the papers were properly executed.

There was a great deal of immaterial testimony in the case, which provoked some heated discussion between the parties as to whether or not tender was made at the time of the meeting in the office of Bugge & Swartz, or whether tender of the money to C. P. Lee was made at the first call at the office of the respondent. But whatever may be said of those contentions, it is undisputed that a tender was made to C. P. Lee at his office on the 11th day of August, and a demand made for the deed and abstract. It was the duty of the respondent P. P. Lee, when he left the country leaving behind him an obligation of this kind, to appoint an agent and to notify the other party to the obligation who the agent was, so that he could pay the money according to the contract. The appellant went where he naturally would be expected to go—to the office of the respondent, and made his demand on the agent, as we understand the record; and

he was under no obligations to go a second time to the office of the attorneys, or to wait any longer for the abstract of title. The contract provides that an abstract of title shall be furnished, and of course the contract must be construed to mean that the abstract of title would accompany the deed, or that it should be furnished before the time expired for a forfeiture of the contract, so that it could be examined. The court finds that the defendants procured such abstract of title with all possible diligence after demand therefor on the 10th day of August, 1910, but the abstract should have been ready to accompany the deed which it was the duty of the respondents to make or to deliver at that time. It will not avail parties who enter into such contracts as this to allow the time to expire, and then excuse themselves by saying that they would thereafter do with all possible diligence what should have been done at that time.

If the appellant had failed to make the payment when it was due by the terms of this contract or for four days after that date, there can be no doubt that the payment made could have been forfeited at the option of the respondents; and if the land, instead of declining had sharply enhanced in value, there is little doubt that such election would have been made. The terms of the contract were definite and time was expressly made the essence of the contract. Under the contract, it was plainly the duty of each party to comply with its terms, and a failure to do so on the part of either, whether purposely or by neglect or misfortune, conferred the right of rescission on the other. The object of entering into the contract was to definitely determine and fix the rights of the parties to it. There is no contention in this case that the abstract would have been ready even if the appellant had gone again to the office of attorneys Bugge & Swartz. In fact, it appears that it was not ready, and the first showing of respondents being ready to deliver was a letter written by Bugge & Swartz to appellant on the 14th day of August, four days after the demand was made,

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that the abstract had been completed and that the respondents were ready to carry out the terms of the agreement. Mr. Bugge candidly admitted that the abstract had not been prepared on time through a misunderstanding between him and C. P. Lee.

The other matters, in relation to the recording of the assignment and the tender of the quitclaim deed, are not controlling. It is true the assignment was not recorded before the demand was made, but the respondents and their agent had actual notice of the assignment. They knew that Mauk was the owner of this contract, as shown by the testimony of the agent and the correspondence of the respondent P. P. Lee himself. The tender of the quitclaim deed was a matter which really did not reach the merits of the case, and it was not upon this issue that the defense to the action was based. This was a matter which the court, if he deemed it necessary, would order to be attended to at any time in the trial of the cause before judgment issued in favor of the appellant.

The case was tried and contested upon the theory that the appellant had not made his demand for the deed and the abstract, and had not made a tender to the agent of the respondents, and upon the further theory that the abstract was really furnished within a reasonable time. Having found against the respondents upon these controlling propositions, we are compelled to reverse the order of the lower court, which is instructed to enter a judgment for the plaintiff for the relief demanded.

ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9670. Department Two. December 6, 1911.]

M. P. BLUM *et al.*, Respondents, v. WILLIAM J. SMITH *et al.*,
Appellants.¹

EXCHANGE OF PROPERTY—RESCISSION—FAILURE OF CONSIDERATION—EVIDENCE—SUFFICIENCY. There is a failure of consideration for the exchange of property, warranting a rescission and an action to set aside plaintiff's deed, where defendants agreed to transfer a lease of an apartment house, requiring the written consent of the landlord to the transfer, and defendants failed to secure the landlord's consent or to make any effective assignment; and where the defendants agreed to transfer by a bill of sale the furnishings and good will of the business, which was presumptively community property, and the bill of sale therefor was executed by the wife alone without the husband joining therein.

SAME—FRAUD—EVIDENCE—SUFFICIENCY. The vendee of a lodging house lease and furniture is not estopped from rescinding an exchange of property therefor by relying on representations that the vendors were owners of the lease and could transfer a good title thereto, and that the house and tenants were of desirable class, where gross fraud was committed and active steps taken to mislead.

HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION. Under the presumption that property acquired after marriage is community property, and in the absence of evidence that personal property was the separate property of the wife, her bill of sale thereof is a nullity, under Rem. & Bal. Code, § 5917, giving the husband sole management and control of community personalty.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 24, 1911, upon findings in favor of the plaintiffs, in an action for rescission and cancellation, after a trial before the court without a jury. Affirmed.

Emerson H. Carrico, for appellants.

J. W. Brown, for respondents.

ELLIS, J.—The respondents brought this action to rescind a contract for an exchange of real estate for a lease and the furniture of an apartment house in the city of Seattle, and

¹Reported in 119 Pac. 183.

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to set aside a deed of certain real estate, made by them to the appellants, on the ground of fraud and deceit claimed to have been practiced by the appellants to induce the exchange, and also on the ground of alleged failure of the appellants to perform the contract on their part. The cause was tried to the court without a jury. From a decree rescinding the contract and setting aside the deed, the defendants have appealed.

The agreement for the exchange was verbal, and the evidence as to what the agreement actually was is extremely conflicting. The court found, and we think the finding was supported by a preponderance of the evidence, that it was agreed that the defendants, appellants here, should transfer by bill of sale to the plaintiffs, respondents here, an apartment house known as the Metropolitan Hotel, consisting of the furnishings, good will of the business, all advanced rents, the books of the business, a lease of the premises with a written consent from the landlord consenting to the transfer and extending the lease for two years, and reducing the rental from \$450 per month to \$375 per month; that, in exchange for these things, the plaintiffs were to convey by deed to the defendants the lots and acreage described in the complaint.

It is admitted that on May 10, 1910, the respondents delivered a deed of the real estate to the appellants, and the appellant Loretta Smith delivered to the respondents a bill of sale of the furniture and furnishings in the apartment house on its face purporting to be her separate instrument. It was not signed by her husband, nor was he referred to therein. The respondent Blum testified that he accepted this bill of sale upon the assurance of Mrs. Smith and the agents who negotiated the exchange that her husband's signature was not necessary. There was, however, no evidence tending to show that this property was the separate property of Mrs. Smith. She claimed that the failure of her husband

to join in the bill of sale was a mere oversight. Upon receiving the bill of sale, respondents assumed possession of the premises. It appears that, on the same day, Mr. Blum, Mrs. Smith, and her agent, a Mr. Wilson, called upon West & Wheeler, agents for the owner of the hotel building, and sought to secure their consent to the transfer and an extension of the lease, but these agents refused to accept the respondents as tenants without further investigation. The respondent Blum gave them certain references and went away. A day or two later, Mrs. Smith delivered to the respondent Blum the lease, with an assignment executed by herself and husband. The lease by its terms could not be assigned without the written consent of the owner of the premises. Mrs. Smith claims that she then suggested that they go again to the property agents and secure their consent to the transfer; that Blum then stated that he could not go at that time, but that he would see to the matter himself; that he said he cared nothing about the lease and expressed dissatisfaction with the number of vacant rooms in the house, but at that time he gave her a written agreement to furnish abstracts of title to the real estate which he had conveyed to the appellants. Mrs. Smith then paid to the respondents about \$32, which she claimed was the amount of advanced rents collected by her. Blum testified that he again called upon the property agents, and they again refused to consent to the transfer of the lease, and never at any time recognized him as a tenant. It appears that, at about this time the respondents determined to bring suit for a rescission, and made no further effort to secure recognition as tenants. The evidence shows that the lease had been formerly assigned by the Smiths to one Jarnigan, but that they still retained possession of it, and so far as the evidence shows, Jarnigan made no claim upon the property.

Both respondents testified, in effect, that during the negotiations leading up to the exchange, Mrs. Smith represented that the rooms of the hotel were nearly all occupied

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by desirable tenants, and that the business was producing a monthly income of over \$700, and represented the monthly operating expenses at about \$400; that, when she exhibited the rooms for their inspection, all but thirteen of the eighty rooms showed evidence of tenancy, such as clothing, valises, and the remains of food and drink upon the tables; that she told them sixty-three of the rooms were occupied by desirable and good paying tenants, and that she was receiving for each of the rented rooms and apartments much more than she was actually receiving; that soon after they took possession, the fact developed that only about twenty-five of the rooms were occupied, and these for the most part by immoral people given to fighting and other disorderly conduct.

All of the foregoing testimony of the respondents was vehemently contradicted by Mrs. Smith, who testified to the effect that respondents were accorded every opportunity to investigate for themselves; that she told them that a great many of the rooms were vacant and that she made no representations as to what the monthly income and expense would be, but did tell them that business was then dull. The agents who negotiated the exchange also testified that they told the respondent Blum that many of the rooms were vacant. On the other hand, the respondents produced a paper showing figures which they claimed were made by Mrs. Smith in demonstrating the income and expenses of the business which corroborate their testimony as to her representations. Mrs. Smith did not deny that she made the figures, nor did she offer any satisfactory explanation of them. It also developed that the current taxes upon the furniture were unpaid.

One Lavenberg testified that the respondent Blum, shortly before this action was commenced, told him that he was going to sue to recover the property conveyed because there had been found trace of coal upon a certain twenty acre tract, and that, if he could recover this tract, he could make

a good sale of it. The testimony of this witness was not convincing, and in any event, we consider it of little materiality in view of the entire record. It was proven by a number of witnesses that the lots and acreage conveyed to the appellants by the respondents had a value of about \$3,500.

On May 26, 1910, the respondents instituted this action, and both parties denying ownership, a receiver was appointed by the court to take charge of the furniture, which was finally sold by the receiver, under the direction of the court, for \$700, which, with rents collected, remains in the registry of the court subject to the expenses of the receivership.

The foregoing analysis of the evidence makes it plain that the judgment of the trial court should be affirmed. It is manifest that the agreement of exchange was never performed by the appellants. There was a failure of consideration for the respondents' conveyance of their lots and land. The appellants did not make any effective transfer of the lease, nor secure an extension thereof, and the evidence makes it reasonably clear that they could not do so. In fact, Mrs. Smith stated that the appellants did not own the lease, and was finally driven to the position that all they attempted to sell was the furniture, a position contrary to the overwhelming weight of the evidence and utterly inconsistent with her own act in attempting to transfer the lease. While there was evidence to the effect that Blum said he would attend to the lease himself, and cared little for it anyway, that was after he had parted with his deed; and it is apparent, also, that was after he had discovered that the value of the business had been grossly misrepresented. The evidence was not sufficient to estop him from claiming the right to rescind. There can be little doubt that the appellants represented that they owned the lease, could transfer it, could procure the owner's consent thereto, and could procure an extension. These representations, under the evi-

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dence, constituted actionable fraud. *Jankowsky v. Slade*, 60 Wash. 691, 111 Pac. 773.

The respondents also had the right to a valid bill of sale. They never received one, and none was ever tendered. In the total absence of evidence that the hotel furniture was the separate property of the wife, there is a presumption that it was community property of herself and her husband. The statute, Rem. & Bal. Code, § 5917, declares:

"The husband shall have the management and control of community personal property, with like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

On the record before us, had the bill of sale been executed by the husband and wife, or by the husband alone, it would have been sufficient. Having been executed by the wife alone, it was a nullity. Under the evidence adduced, the respondents were entitled to a rescission for failure of performance by the appellants. 17 Cyc. 836 *et seq.*

Moreover, the evidence sustains the court's finding that the appellants were guilty of fraud and deceit. A careful examination of the evidence convinces us that Mrs. Smith represented the monthly income from the business much in excess of the reality. She also represented that the tenants were of a desirable class. The evidence indicates that they were not. These were matters peculiarly within the knowledge of the appellants and unknown to the respondents. The respondents made an inspection of the premises, but neither of these things would be disclosed by an inspection, and there is evidence that vacant rooms were so arranged as to appear tenanted. The respondents had the right to rely upon these representations, especially when active steps were taken to throw them off their guard. That they did so rely, can hardly be questioned. *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114; *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Best v. Offield*, 59

Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55; *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799; *McMillan v. Hillman*, ante p. 27, 118 Pac. 903; 14 Am. & Eng. Ency. Law (2d ed.), p. 123; Bigelow, *Fraud*, p. 524.

The trial court's findings of fraud and failure of performance on the appellants' part were sustained by the more convincing evidence. The court committed no error in entering the decree appealed from. It is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9784. Department Two. December 8, 1911.]

ARCHITECTURAL DECORATING COMPANY, *Appellant*, v.
GUSTAF NICKLASON *et al.*, *Respondents*.¹

MECHANICS' LIENS — CLAIM — DUPLICATE STATEMENT — MATERIALMEN — CONTRACTORS. Rem. & Bal. Code, § 1133, providing that no lien for materials shall be enforced unless duplicate statements shall be sent to the owner of all materials furnished to any person or contractor, applies only to materialmen and has no application to a lien claimed by a contractor furnishing both labor and materials for decorative plaster work under a contract with the owner through the owner's agent.

SAME — DUPLICATE STATEMENTS — MATERIALS FURNISHED TO OWNER. Rem. & Bal. Code, § 1133, requiring materialmen to furnish to the owner duplicate statements of all materials furnished to any person or contractor, has no application to materials furnished direct to the owner under a contract made by the owner's agent.

APPEAL — REVIEW — FINDINGS — PRESUMPTIONS — NECESSITY OF EXCEPTIONS. Where the evidence is not brought up, findings of fact, complete and sufficient as to every essential fact in the case, and not excepted to, are conclusive; and it cannot be assumed that the evidence supports the decree.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered March 20, 1911, upon

¹Reported in 119 Pac. 177.

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findings in favor of the defendants, in an action to foreclose a mechanics' lien, after a trial on the merits before the court. Reversed.

Roberts, Battle, Hulbert & Tennant and George R. Biddle, for appellant.

F. E. Anderson and E. J. Adams, for respondents.

MORRIS, J.—Appeal from a decree denying appellant a foreclosure of a mechanics' lien. The case is before us upon a short record, containing only the findings of fact, conclusions of law, decree, and two exhibits. The court finds that the respondents are indebted to appellant in the sum of \$646, for materials furnished and labor performed in the construction of the building; that it had filed its lien in due time, but was not entitled to a foreclosure for failure to comply with Rem. & Bal. Code, § 1133, providing that a materialman must send to the owner of any building to which materials are furnished for construction, alteration, or repair, a duplicate statement of all materials so furnished to any person or contractor; otherwise the lien shall be unenforceable. The court finds no such duplicate statement was delivered to the owner, and for this reason holds the lien is not entitled to be foreclosed.

In our judgment the findings do not support the decree for two reasons.

(1) The appellant is not a materialman. It contracted with the agent of the owner to do the decorative plaster work, supplying both labor and material. It was furnishing labor to the same extent as any mechanic who worked on the building. The fact that it furnished its own material and put it in place does not make it a materialman. Its contract was direct with the owner through the owner's agent. The statute covers a situation where three persons are involved, the one who furnished material, the one to whom the material is furnished, and the owner of the building for which they are

furnished. The owner has no contractual relation with the first person, and has no means of knowing what materials may be furnished to the second person upon the faith and credit of the building, except as he receives notice through his duplicate bills. Upon receipt of these, the owner is in a position to protect himself against his contractor and the materialman, by checking up the contractor and the materials claimed to be furnished. This is the plain purpose of the statute. Where the owner contracts directly for material, he requires no notice outside of his contract, to protect himself. The findings make appellant a contractor and not a materialman, dealing with the owner. The contract was of itself a statement of the materials furnished, and none other was necessary.

(2) Even if we should concede appellant to be a materialman, having delivered his materials to the owner under a contract with the owner through his agent, he was not required to send the duplicate statement required by the statute when the materials are delivered to a contractor or person other than the owner. *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851.

Respondent contends the findings do not correctly speak the facts, and that they are manifestly incomplete and we should therefore assume the evidence supports the decree. The trouble with this contention is that the findings are the only facts before us, and we are bound by them. There is no evidence of incompleteness or insufficiency upon their face. No exceptions have been taken to them. They find every fact essential to be found in a foreclosure case, and we must accept them as they are, and determine only the correctness of the decree based upon them; and being persuaded that the decree is erroneous in its dismissal, and that appellant was entitled to a foreclosure of its lien, the decree is reversed and the cause remanded with instructions to enter a decree of foreclosure in favor of appellant.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

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[No. 9591. Department Two. December 8, 1911.]

EDMONDS LAND COMPANY, *Respondent*, v. THE CITY OF
EDMONDS, *Appellant*.¹

MUNICIPAL CORPORATIONS—ASSESSMENTS—JURISDICTION—LANDS BEYOND CITY LIMITS. An assessment levied by a city for the construction of a dike, under Rem. & Bal. Code, §§ 7955-7964, upon property outside of the city is void, the city having no extraterritorial jurisdiction, in the absence of express statutory authority.

SAME—ESTOPPEL—JURISDICTION. A city cannot acquire jurisdiction to levy an assessment on lands outside its limits by estoppel through the fact that the owner of the lands petitioned for the improvement, as the petition would not justify any proceeding in excess of the city's jurisdiction, especially where objection was duly made to the unwarranted action at the first opportunity.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered December 21, 1910, upon findings in favor of the plaintiff, in an action to cancel municipal assessments, after a trial on the merits before the court. Affirmed.

S. J. White, for appellant.

Preston & Thorgrimson, for respondent.

MORRIS, J.—The city of Edmonds appeals from the decree of the lower court, canceling certain assessments, levied upon property of respondent situate outside of the municipal boundaries, to pay for the cost of building a sea gate constructed under the diking act of 1907, as found in Rem. & Bal. Code, §§ 7955 to 7964. In the proceeding before the court below, other questions were presented upon which it was sought to set aside the assessment. The court, however, not passing upon the other questions submitted, held that the land being outside the city could not be assessed for an improvement undertaken as a municipal improvement. This conceded fact seems to us so conclusive as establishing the correctness of the decree that none other need be discussed.

¹Reported in 119 Pac. 192.

The city of Edmonds has no extraterritorial jurisdiction. It cannot levy an assessment upon lands beyond its limits to pay for an improvement undertaken as a municipal improvement, even though it should be confessed that such outside lands were directly benefited. The power to levy an assessment upon lands benefited must be held to be a power to be exercised upon lands that are subject to municipal control. If it is sought to exercise purely municipal powers outside of its own limits, such authority must be derived from some proper authority clearly conferring it. No such authority has been called to our attention, and we know of none under which this assessment can be sustained. *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217; *Farlin v. Hill*, 27 Mont. 27, 69 Pac. 237; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628; *Gilchrist's Appeal*, 109 Pa. St. 600; *Matter of Flatbush*, 60 N. Y. 398; *Deyo v. Newburgh*, 122 N. Y. Supp. 835; 28 Cyc. 1128.

It is contended by appellant that respondent is estopped from avoiding its assessment because F. R. Atkins, in whom the title to the land then rested as trustee for the owners, signed the petition asking for the improvement. The city could not acquire jurisdiction over these outside lands by estoppel. The petition could be nothing more than a request to the city that it proceed within the powers conferred upon it by law in making this improvement. It could not act as authority to the city to proceed beyond and outside of any legal authority. And when the city departed from the exercise of its legal powers, it could not justify its departure upon the authority of any petition requesting it to do so. *Howell v. Tacoma*, 3 Wash. 711, 29 Pac. 447, 28 Am. St. 83; *Schuchard v. Seattle*, 51 Wash. 41, 91 Pac. 1106; *Strout v. Portland*, 26 Ore. 294, 38 Pac. 126; *Mc-Lauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710; *Wakeley v. Omaha*, 58 Neb. 245, 78 N. W. 511; *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139; *Grant v. Bartholomew*, 58 Neb.

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839, 80 N. W. 45; *Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128.

We have examined the cases cited by appellant, and do not find that they sustain any contrary rule. *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632, upon which strong reliance is placed, holds that one who petitions for a local improvement cannot question the validity of the assessment unless the city had no jurisdiction or so far departed from established methods as to lose jurisdiction. It will be noted that the invalidity of the assessment in question, in so far as it touches respondent's lands, is because of a lack of jurisdiction in the city, and hence within the exception in the *Aberdeen* case. Neither is *Travis v. Ward*, 2 Wash. 30, 25 Pac. 908, authoritative here. There, at the request of certain petitioners, county commissioners entered into a contract for the building of a road, and issued warrants in excess of the assessed valuation. It appeared that this was done in good faith at the request of petitioners, who, with full knowledge of the contract and all work done thereunder, permitted the work to proceed to completion and the warrants to issue. It was held that, having induced the commissioners to act and permitted the work to proceed without objection, they could not take advantage of their own wrong and enjoin the payment of the warrants. There could be no question in that case that the building of the road and the issuance of the warrants would subject the petitioners' property to the payment of the warrants, the property being within the district to be assessed.

Here, however, the property is not within the district to be assessed. There the petitioners stood idly by and permitted the work to be done and the warrants to issue upon the faith and credit of their property. They not only made no objection, but by their every act acquiesced in the proceedings. Here respondent makes its objection to the city council as soon as it appears that it is the intention of that body to assess lands outside of the corporate limits. In the

one case, petitioners not having spoken when they should, equity will close their mouths when they seek to take advantage of their own wrong. In the present case respondent spoke at its first opportunity, and must be accorded its full legal rights.

Other cases cited by appellant are where a plea of *ultra vires* has been held unavailing because of performance. We cannot see how this principle is involved in the case at bar. Neither do we think there is anything in *Barlow v. Tacoma*, 12 Wash. 32, 40 Pac. 382; *Wingate v. Tacoma*, 18 Wash. 603, 43 Pac. 874, and *Tacoma Land Co. v. Tacoma*, 15 Wash. 133, 45 Pac. 733, that militates against the rule here announced. Each of those cases predicates an estoppel upon an equitable acquiescence in the proceedings complained of. In other words, one cannot complain of his own wrong, nor escape the effect of the cause he initiates. No such rule could extend the assessable power of a city to lands beyond its boundaries, which is the point we are here dealing with.

The judgment is therefore affirmed.

DUNBAR, C. J., ELLIS, Crow, and CHADWICK, JJ., concur.

[No. 9832. Department Two. December 8, 1911.]

ANTON FRENGEN, *Respondent*, v. STONE & WEBSTER
ENGINEERING CORPORATION, *Appellant*.¹

MASTER AND SERVANT—FELLOW SERVANTS—WARNING—SIGNALS. Where plaintiff and a fellow workman were working together at the top story of a building in handling timbers from a hoisting derrick, by means of a cable and pulley, and they did not depend upon the foreman to give warning of a signal to the engineer to hoist, but, on the contrary, the foreman depended upon them to give the signal, the two are fellow servants, and plaintiff cannot recover, where his fellow workmen, on being asked if they were ready for the hoist, replied "all ready; go ahead," whereupon the foreman signaled the engineer to start the hoist without warning the plaintiff, thereby causing his hand to be drawn into the pulley; and it is

¹Reported in 119 Pac. 193.

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immaterial that plaintiff had the lesser experience of the two and usually relied upon his fellow worker to give the signal (DUNBAR, C. J., dissenting).

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 13, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in the construction of a building. Reversed.

Farrell, Kane & Stratton, for appellant.

Vince H. Faben and *Henry Gulliksen*, for respondent.

MORRIS, J.—Respondent was a common laborer in the employ of appellant in the construction of a six-story building at Seattle. On March 5, 1910, he was injured by having the fingers of his right hand caught in a pulley, which was part of an apparatus for hoisting large timbers to the upper floors. There was no permanent injury, except the loss of the first joint of the second finger.

Respondent had been engaged in this work about two weeks, and on the day of the injury, he and a fellow workman named Boyle were up on the roof to which the timbers were on that day being hoisted. The method employed was to fasten a sling around the timber, to which was attached a hook at the end of a cable. The cable was operated by a derrick, the movements of which were controlled by an electric motor. The cable was connected with pulleys to control its rise and fall. After being placed in the sling and the hook and cable attached, ropes were placed around each end of the timber with a man at each rope to control its swing. It would then be hoisted to the roof, where it would be taken care of by respondent and Boyle, and placed where desired. When the timber reached the roof where it could be handled by appellant and Boyle, and any direction was to be given as to the further movement of the derrick, the foreman, who was on the floor below, would depend upon the men above to

give him a signal, which was generally if not always given by Boyle. The foreman would then signal the man in charge of the motor, and the derrick and cable would be moved accordingly.

At the time of the injury, a large timber, weighing about fourteen hundred pounds, and intended for the top of the elevator shaft, had been hoisted up to the roof. Some lumber piled on the roof along the edge of the hoistway interfered with landing the timber on the roof, and the hoist was stopped and the lumber removed. At this point comes the only discrepancy in the testimony. Respondent and one of his witnesses testify that respondent was then directed by the foreman to grab the cable and pull in the timber. At that time, there were only from six to ten inches of the cable between the end of the derrick and the pulley which respondent caught hold of, and while he had such a hold the foreman, suddenly and without warning, directed the starting of the motor, moving the cable and drawing respondent's fingers into the pulley. The foreman and Boyle, who was working alongside of respondent, deny any such order was given to respondent. They testify that, without direction from any one, he grabbed hold of the cable just as the foreman gave the signal to the motorman. The verdict would establish the theory of respondent as the fact in the case. It is, however, undisputed in the testimony that, before the foreman directed the starting of the motor, he inquired of the men on the roof if everything was all right, to which Boyle responded, "All ready; go ahead." Assuming, then, that, as testified to by respondent, the foreman gave him no warning that he intended to start the motor, is he entitled to recover?

Appellant contends that respondent was guilty of contributory negligence in grabbing hold of the cable in such a dangerous place, as he knew that it was the purpose to immediately move it, and that having only from six to ten inches free space, there could only be one result upon its starting—to draw the hand into the pulley. Without dis-

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cussing that feature of the case, it appears to us that the decision of the case must hinge on the relation between respondent and Boyle, since, whether or not the foreman gave any warning to respondent, it is unquestioned that Boyle, standing alongside of respondent, initiated the movement of the cable by telling the foreman they were, "All ready; go ahead." If Boyle, in giving such a direction to the foreman, was a vice principal, respondent can recover. If he was a fellow servant, he cannot.

Respondent contends, citing *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114, and *Dossett v. St. Paul & Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273, that where a servant is in a known dangerous place, it is the duty of the master to warn him before directing any movement of machinery that adds to the danger of the place, and that any one to whom the master intrusts the duty of giving such a warning is a vice principal for whose negligence the master must answer. That rule will readily be admitted. But we cannot conceive of its application here. That is the rule where the safety of the place where the servant is at work is under the control of the master, and where the servant depends upon signals being conveyed to him by others for his protection, as in *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Norman v. Shipowners Stevedore Co.*, 59 Wash. 244, 109 Pac. 1012, and *Jacobsen v. Rothschild*, 62 Wash. 127, 113 Pac. 261. There could be no broader statement of the rule than that given in the *Westerlund* case.

"It was the duty of appellants to furnish respondent with a reasonably safe place in which to work, and to keep that place reasonably safe during the progress of the work. This duty was not confined alone to the place where respondent performed his work, but was extended to all the instrumentalities, machinery, and appliances which from the nature of the work directly affected the safety of the place. Such, then, being the duty of the appellants, failure to properly control the movement of the cable, by giving wrong signals

or acting without signals, while respondent was in a position of danger, was negligence, irrespective of the men or means employed for that purpose. Being a duty imposed by law upon the appellants, such duty could not be delegated to others, whether coemployees of respondent or not, so as to relieve appellants from liability for their failure to properly perform this duty."

We have also held, in a long line of decisions, commencing with *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313, that fellow workmen may be fellow servants with regard to some particular part of the employment, and that as to other parts of the employment the fellow workman may stand in the relation of vice principal to the others, depending entirely upon what is being done at the time. If a master takes a common laborer, and for the time being places him in a position where he contributes to the safety of the place where his fellow workmen are engaged, by giving signals which affect the safety of that place and are relied upon by the workmen for their protection, being engaged in a nondelegable duty of the master, he is in the performance of that duty; and in the giving of that signal representing the master, and becomes a vice principal. But in all the cases where this rule is announced, the injured servant has no connection with the signal. He neither initiates it nor communicates it. He simply acts in response to it, depending altogether upon others for the time and manner of the signal, as his protection.

Under the uncontradicted testimony in this case, respondent did not depend upon the foreman to signal him when the motor was to be started. The foreman, on the other hand, depended upon respondent and his fellow workman Boyle, to tell him when he should direct the movement of the motor and derrick. The signal was not one coming to them upon which they should act. It was one proceeding from them upon which the foreman would act. If the foreman in this case directed the starting of the motor when respondent was in a position of danger, it was only after receiving a com-

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munication from Boyle—working alongside of respondent, engaged in the same endeavor to pull in the timber—that everything was all right and to go ahead. Boyle and respondent were engaged in the same work at the same time. Neither one had any supervision over the other. They acted in common, each had ample opportunity to observe the other. Respondent knew that the foreman would not start the motor after it had stopped, to permit them to obviate the difficulty of its landing, until Boyle had informed him it was proper to do so. They answer every test of fellow servants. It is true that Boyle generally gave the signal, and that the foreman depended upon him to do so because of his greater experience. There was no necessity of respondent and Boyle jointly giving the signal. The respondent knew that the foreman would act on Boyle's signal, and we cannot see why, knowing this, and knowing he was in a position of danger, he did not inform Boyle, when the foreman called, that he was not ready to have the cable moved. It seems to us it was his duty to do so, having for two weeks been engaged in the same work, and knowing during all that time that the foreman would act under Boyle's direction, and having had every opportunity to observe his method of communicating the signal to the foreman. We might add, what more could the master do than he has done here? He refused to act upon his own assumption that respondent and Boyle were ready, but required them to determine for themselves when they were ready. Their protection in this regard is placed in their own hands.

We said in *Ponelli v. Seattle Steel Co.*, 64 Wash. 269, 116 Pac. 864, where men were engaged assisting one another in a common task, that the mere fact that one took the lead in directing the work because of age, experience, or common consent, would not change the relation of fellow servants, and make the one so directing a vice principal. So that the fact that Boyle, because of his greater experience, was relied upon by respondent and the foreman to initiate

the movement of the cable, by directing the foreman when they were ready, does not make him a vice principal. Boyle's act was more the act of respondent, and represented their common situation upon which the master acted, than it was the act of the master communicating a situation to them upon which they acted.

If, in the following relations, the rule of fellow servants has been sustained: two workmen unloading a car, one under the direction of the foreman tells the other what to do; a foreman and his helper erecting a post; a teamster and his assistant loading iron plates on a truck; two brick masons laying a wall; a foreman and a workman erecting a derrick; two motormen on an electric railway, who arrange their own meeting and passing places; two painters painting an engine, where one tells the other a known danger, which for the time stopped the work, has been removed, and relying upon this fact the injured painter returns to work; two brakemen, one on a car and the other operating a switch over which it was intended the car should pass—as we have held in, *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034; *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389; *Cavelin v. Stone & Webster Engineering Corp.*, 61 Wash. 375, 112 Pac. 349; *Swanson v. Gordon*, 64 Wash. 27, 116 Pac. 470; *Grim v. Olympia Light & Power Co.*, 42 Wash. 119, 84 Pac. 635; *Berg v. Seattle, Renton etc. R. Co.*, 44 Wash. 14, 87 Pac. 34, 120 Am. St. 968; *Millett v. Puget Sound Iron & Steel Works*, 37 Wash. 438, 79 Pac. 980; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999; we cannot see why, upon the application of the same principles, two workmen, engaged in unloading timbers from a hoisting derrick onto a roof, where by common consent of themselves and the master one undertakes to tell the master when the derrick should be moved, are not fellow servants.

The fellow servant rule is not a popular one with this

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court, and we have heretofore refused to make it the basis for defeating recovery for an injured workman except in those cases where it was so plainly applicable that, to the majority of the court, there seemed no escape unless the doctrine was to be entirely abrogated and written out of the law of this state. If it is, it must be done by the legislature and not by the courts. We are, therefore, constrained to hold that Boyle and respondent are fellow servants, and for that reason respondent cannot recover.

The judgment is reversed.

CHADWICK and CROW, JJ., concur.

ELLIS, J. (concurring in part)—I concur in the result only on the ground of contributory negligence. The respondent, when he took hold of the few inches of cable between the pulley and the sling, must have known that any movement of the machinery would crush his hand.

DUNBAR, C. J. (dissenting)—I dissent. I have no fault to find with the law as announced by the majority, but in my judgment it has not been applied to the facts in this case. The opinion says, in the course of the statement, that the signal was generally if not always given by Boyle. The statement, to be literally correct, should be a little more definite on this crucial question. The testimony on this point was furnished by the defendant. The acknowledged foreman and signalman, Mr. Bartell, testified as follows:

"Q. Boyle was a common laborer, was he? A. Boyle was a carpenter. Q. Working with those other men there? A. Yes, sir. Q. They worked all under your direction? A. Yes, sir. Q. Boyle did not hold any higher position than Mr. Frengen, did? A. Boyle was a man that I always depended upon to give me the signal— Q. From above? A. —as he had had experience in that business."

This testimony was not disputed nor modified, and is one of the admitted facts in the case. Hence, it appears that Boyle always gave the signal and that the respondent had

nothing to do with it. The case stands then, without any controversy as to the fact that there were two signalmen. The signal could not be given to the engineer from the roof where the respondent was at work, and it was necessary for some one there to make a signal to the foreman below, and he would communicate it to the engineer, and that "some one," who was authorized to make the signal from above, and who did make it, was Boyle. Hence Boyle became a signalman. It matters not if he did have other duties to perform in conjunction with the respondent. This would probably be simply an economic arrangement, and this particular duty of making the signal devolved upon him with as much force as if he had had nothing to do but to make signals. Then, if the doctrine is true, which this court has uniformly announced in numberless decisions, and which is supported by almost universal authority, and which is in fact quoted approvingly by the majority from the case of *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765, that a duty to signal, where a signal is necessary to protect a workman in his right to a safe place to work, is a duty imposed by law upon the master which cannot be delegated to others, whether employees of the master or not, so as to relieve the master from liability for their failure to properly perform their duty, how can the deduction be made that respondent and Boyle are fellow servants in a sense that would transfer responsibility for Boyle's delinquencies from the master to the servant?

It has been just as uniformly held, and is candidly acknowledged by the majority, that fellow workmen may be fellow servants with regard to some particular part of the employment, and that as to other parts of the employment the fellow workman may stand in the relation of vice principal to others, depending entirely upon what is being done at the time. This doctrine exactly meets the case in point. If, in handling these timbers, Boyle had negligently or awkwardly caused one of them to drop or slip or swing around

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and hurt the respondent, or had injured him in any way while in the performance of his duty as a colaborer, the negligence would doubtless have been the act of a fellow servant for which the master would not be responsible. But where it is conceded, as it must be here, that the negligence of Boyle was in no way connected with the joint duties of him and the respondent, but was an independent duty with sole reference to maintaining a safe place to work, to hold that he was a fellow servant of the respondent conflicts with every cardinal principle that has been announced by this court on the subject of fellow servant; and the cases cited to sustain the rule announced show, in my judgment, an utter misconception of the principles involved in the respective cases and announced by the decisions.

The first case cited and quoted from, viz., *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405, was where a common laborer was directing and assisting the plaintiff in unloading a car of lumber. The master had told the plaintiff to go with the man that he designated, and he would instruct him how to unload the car. In unloading the car, while both men were engaged in the labor of unloading it, a post or support broke and the plaintiff was injured, and it was held, as stated in the opinion, that in that particular case they were fellow servants. But it will be noticed that in that case they were both working in a common employment, and that the cause of the accident was simply an incident of the work. It was absolutely a joint occupation; the fellow workman had no particular power delegated to him, and one man had the same opportunity to notice and avoid danger as the other. In announcing that opinion, a quotation was made from *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727, where it was said, in reviewing this question:

"The doctrine was applied simply and humanely on the theory that, standing on a level with each other, both as to employment and authority, they had notice which the master

necessarily could not have of the dangers liable to result from the action of the workers; . . .”

But in the case at bar, while they were coworkers with relation to certain things, they were not coworkers with relation to the duty of signaling, because that was a duty that was conferred especially upon Boyle; and it was not an incident to the work which Boyle and the respondent here were doing together, viz., handling these timbers, but it was a vital and special duty of Boyle over which the respondent had no authority or control whatever, and he had a right to rely upon the presumption that the master had furnished an agent to make these signals who would make them properly and in the interest of his safety. The cases seem to have nothing in common.

The next case cited and quoted from is *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389, where it was held that a teamster and his assistant were fellow servants when they were engaged in the common occupation of loading heavy iron plates on a truck, both being experienced men and having conferred together as to the proper manner of loading them; the court saying in that opinion:

“It appears that Peters, the driver, and respondent, as appellant’s employees, were jointly engaged in the task of loading plates; that they were each in such a situation as to afford them a controlling influence the one over the other, and that the only negligence, if any, was their joint act in improperly loading the plates.”

It was certainly not the joint act of Boyle and the respondent in not giving this signal, or in giving it without warning to the workmen; because, as we have seen, the respondent was not authorized to give the signal and had no duty whatever concerning it.

The next case, *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034, was where a millwright, acting as foreman, was assisting in the erection of a post which he was holding in place with his hands, and negligently

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let go, whereupon it fell and injured his helper. It was held that, as to such act in holding the post, he was a fellow servant, because that was a mere detail of the work for which the master was not responsible. There is no suggestion in this case of any act on the part of the foreman outside of the work he was doing as a joint worker with the plaintiff. And without further special review of the cases, they are all of the same character.

It is true that, if the real master, the owner of a business or occupation or factory, is working with a laborer in the capacity of a common laborer, in the performance of that labor he is a fellow servant, and if he negligently acts he is not responsible as master. The corollary of that proposition is that, if one who is ordinarily a fellow servant with another, in the performance of a duty conferred upon him by the master which is not a joint work with the other laborer, negligently causes an injury to the laborer, the master is responsible; for, as before stated, it depends not upon the official character of the men who commit the negligent act, but upon the particular kind of work that they are doing when such negligence is committed. Boyle, then, being a signalman, and it being the duty of the master to furnish a signalman at the place where the signal was given—and that is not disputed—when he failed to give a proper signal or signaled without notifying the workmen, was acting exclusively for the master in the carrying out of the master's duty, and the master is responsible for his negligent acts.

The question of negligence on the part of the respondent in taking hold of the cable where he did, as suggested in the concurring opinion of Judge Ellis, is a question entirely of fact. There was no contention and no showing anywhere in the testimony that the taking hold of the cable and pulling it as the defendant testified that he did, although there was only about an eight inch space for him to catch hold of, was dangerous when the machinery was not moving; and the case was contested by the defendant simply on the ground that

it did not instruct the respondent to take hold of the cable as he did. The testimony of the respondent on that question was as follows:

"A. (Continuing) —and then the timber was hanging, you know, you could not—we could not land it on any ways, and so the foreman told me to go and grab hold on that cable and pull it in so that we could land it down. Q. He told you that? A. He told me that. Q. Was there any other place to hold it or grab it? A. No other place to get hold of it. Q. And he told you to take it there? A. The foreman told me to take—grab hold of the cable and pull it in. Q. Grab hold of the cable and pull it in? A. Yes, and so I did. I went and grabbed hold of the cable like this (illustrating) and I was going to pull on it and at the time I was going to pull then the block came up and caught my fingers right here (indicating). . . . Q. How did that happen? What caused that? What caused that to do that? Why was it? Was there any signal to start up? A. There was no signal. I could not hear—was no signal given me to get out of there before it was—before the motor started."

Again, he testified that he had not been furnished with any peavy, and that the foreman told him to grab hold of the cable and pull it in. He was very positive on this point, both in his direct and cross-examination. George Conrad, a witness for the plaintiff, testified as follows:

"Q. You didn't hear the foreman tell him to grab hold of the cable and pull that in, did you? A. I did. Q. You heard that too? A. I heard that. . . . Q. And the foreman told this man to grab hold of that cable with his hand and pull it in, did he? A. He said, 'Grab hold of the cable and pull it in.'"

And he testified that he was in plain view of it all, and heard it all. Two witnesses for the defense testified, one of them being near by and the other some distance off, that they did not hear the foreman tell the respondent to take hold of the cable. But the foreman Bartell testified positively as follows:

"Q. And state to the jury and court whether or not you ever instructed him, or whether you instructed him on this

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occasion, to catch hold of that cable and pull the timber in. A. No, sir. I certainly never told anybody to grab hold of that cable and pull it in."

So that it will be seen that, on this question, the testimony was absolutely conflicting. In such cases, deduction is for the jury.

These being the only two controlling questions in the case, the first, the question of fellow servant, being determined in favor of the respondent, both by the admitted testimony and the uniform law on the subject; and the second, the question of contributory negligence, having been decided in respondent's favor by a verdict of the jury, the judgment should be affirmed.

[No. 9693. Department Two. December 9, 1911.]

MARTHA ALICE SCAMMON, *Appellant*, v. RICHARD SCAMMON,
Respondent.¹

DIVORCE—DECREE—DISPOSITION OF PROPERTY—VACATION—MISTAKE—MERITS OF APPLICATION. A motion to vacate a decree of divorce in so far as it disposes of property rights, made on the ground of mistake and excusable neglect in presenting the case, is properly denied, where, after taking evidence and a full hearing, it appears that the former judgment was right and the moving party failed to substantiate her claims; any irregularities in the former proceeding being thereby cured.

Appeal from an order of the superior court for Kittitas county, Kauffman, J., entered April 21, 1911, denying plaintiff's motion to vacate a judgment, after a hearing on the merits before the court. Affirmed.

Austin Mires, John Van Zante, and A. H. Tanner, for appellant.

E. K. Brown, for respondent.

¹Reported in 119 Pac. 383.

CHADWICK, J.—This is an appeal from an order denying a motion to vacate a judgment and decree of divorce in so far as it applies to property rights.

It appears that plaintiff instituted a suit, and the testimony to sustain her alleged grounds of divorce was heard by the court, and that thereafter defendant was brought in to make disclosure of the common property. Plaintiff says that she had expected to be present at this hearing, and had furnished her attorney a list of witnesses who, had they been subpoenaed, would have given evidence to sustain her allegations that the community was possessed of a money-making business and of property aggregating in value \$8,000 or more. The defendant appeared, and was examined by counsel for the respective parties, but neither plaintiff nor her witnesses were present. Her attorney had informed her by wire that her presence would not be necessary. The court decreed a divorce, gave the community property, subject to debts, to defendant, and charged him with the payment of suit money and an allowance of alimony of \$25 per month.

After several months, plaintiff filed her motion, supported by sworn petition, in which she sets up several statutory grounds for the vacation of decrees and judgments, the gist of her petition being that she had, by reason of the oversight, neglect, or design of her then attorneys, been deprived of making a showing that would have sustained the allegations of her complaint with reference to the character and extent of the property. This petition came on for hearing, both parties appearing and being represented by present counsel. The plaintiff and several witnesses, some of whom she says she had expected to testify in her behalf on the former hearing, were called and gave evidence. Defendant was a witness in his own behalf. The issue as to the property was fairly tried out; and, in the judgment of the trial judge, in which judgment we concur, plaintiff failed utterly to substantiate her assertions that the community had been possessed of property of any considerable value over existing in-

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debtedness. Whatever irregularities may have occurred in the former proceeding which might have tended to the prevention of a fair trial, it is clear to us that they were all cured by the subsequent proceedings and the hearing upon the petition to vacate. Nor do we find merit in the contention that the evidence is insufficient to warrant the present order of the court. The court was open and both parties might have made, and we must presume they did make, all the showing at their command. An order denying the motion to vacate as made in this case is equivalent to a decree on the merits; and being sustained by the weight of evidence, must be affirmed.

Judgment affirmed.

DUNBAR, C. J., MORRIS, CROW, and ELLIS, JJ., concur.

[No. 9716. Department Two. December 9, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.

WILLIAM P. O'BRIEN, *Appellant*.¹

CONTINUANCE—ABSENCE OF WITNESS—DILIGENCE—DISCRETION. It is not an abuse of discretion to refuse a continuance in a criminal case, asked on account of the absence of a witness who was present when the case was set for trial and would probably have been present but for a wreck which detained him, where the case had been once continued on a like showing and due diligence was not shown by subpoenaing him, and it was not made to appear reasonably certain that he would be present later.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—FACTS OTHERWISE ESTABLISHED. In a prosecution for assault, the exclusion of evidence of the character of the wound, taken in connection with a remark of the prosecuting attorney that the person assaulted had since died, is not prejudicial in that the jury might be led to believe that death resulted from the assault, where the jury were instructed that the remark could be considered only to account for the absence of the party as a witness; and especially where the wound was described by the attending physician.

¹Reported in 119 Pac. 609.

ASSAULT—EVIDENCE—MATERIALITY—DEATH OF PARTY. In a prosecution for assault in the second degree, where the one assaulted died before the trial, it is not error to exclude evidence as to the cause of his death.

CRIMINAL LAW—EVIDENCE—OPINION—REPUTATION. In an action for assault, the quarrelsome disposition of the one assaulted cannot be shown by asking the opinion of a witness as to whether he was a peaceable man, but only by establishing his reputation.

APPEAL—HARMLESS ERROR—TRIAL—RULES OF COURT—OBSERVANCE. Nonobservance of a local rule of court with respect to copies of the instructions requested is not ground for reversal.

APPEAL—HARMLESS ERROR—TRIAL—INSTRUCTIONS. Refusing requests for instructions because not made within the time required by a rule of court is not prejudicial error, where the instructions given sufficiently stated the law of the case.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A motion for a new trial on the ground of newly discovered evidence of a witness in a distant state, who was telegraphed to a day or two after the trial, is properly denied for want of a showing of diligence, where the circumstances showing diligence were not stated and it was not shown how or from whom the information was obtained.

Appeal from a judgment of the superior court for King county, Main, J., entered March 11, 1911, upon a trial and conviction of assault. Affirmed.

James B. Metcalfe, for appellant.

John F. Murphy and *Alfred H. Lundin*, for respondent.

CHADWICK, J.—Defendant was convicted of the crime of assault in the second degree. Error is predicated upon several assignments, which we will discuss in the order in which they are presented.

(1) It is urged that the court erred in refusing to grant a continuance of the trial from February 23 until March 2, a period of nine days, in order to procure the attendance of a witness. It seems that one Christiansen was a witness to a part of the affray; that he was present on December 20, when the case was set for trial but was put over on account of the congested condition of the docket. It was expected

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that Christiansen would be present on February 23, and it is likely that he would have been but for the wreck of the steamer Cottage City on which he was engaged as quartermaster. The wreck occurred in the northern waters and Christiansen was transferred to another ship that could not be expected to arrive in port before March 2.

This court is committed to the rule that in all such cases there must be a show of diligence. The case had been once continued upon a like showing. No subpoena had been issued or served, nor is it made certain that Christiansen would have been willing to voluntarily follow the fortunes of the case. Therefore, in such cases, this and other courts have held that a show of diligence is best evidenced by putting, or attempting to put, a prospective witness under those restraints which have been provided by statute. To say that, if a prospective witness were present he would testify in a given way, or that he promised to be present and so testify, may not be enough to satisfy the law. It must be made to appear reasonably certain that he will be present, and appellate courts have been loath to interfere with the discretion of trial judges in denying continuances, when, after lapse of time, there is no showing that the aid of the court has been sought by the party. We find no abuse of discretion in this order of the court. *State v. Brooks*, 4 Wash. 328, 30 Pac. 147.

(2) It is urged that the court erred in excluding testimony showing the character of the wound inflicted. The vice of this ruling is alleged to lie in the fact that the state's attorney had, in making his opening statement, told the jury that the party assaulted had since died, thus conveying to the minds of the jury that he had died of the wound which defendant had inflicted. It is argued that this remark and the ruling of the court are enough to destroy the presumption of innocence and invite a verdict of guilty because the victim of the assault was dead. We find it impossible to follow counsel in this argument. The court, in words, twice

told the jury that the remark objected to should not be considered further than to account for the absence of the party as a witness. This, coupled with the fact that, under the charge the manner of death was an immaterial question, makes it reasonably certain that the jury was not misled to the prejudice of the defendant. Aside from this, we find that the attending physician described the wound so that defendant's contention in this behalf was probably covered in any event.

(3) The refusal of the court to hear evidence as to the actual cause of the death of the assaulted one was not error. This assignment is controlled by our discussion of assignment 2.

(4) The following question was put to a witness: "What sort of a man was Mr. Smith—a peaceable man? Answer: No." This was objected to, and the objection was sustained, but the answer was not stricken by the court. But assuming that it was so understood by the jury, it is said that the court erred in excluding evidence of the quarrelsome and insulting character of the party "who made the first assault." We assume that counsel directs this contention to the exclusion of the testimony just quoted, for several witnesses testified to the peaceable character of the defendant. But it will be seen that the grounds upon which counsel bases his contention are not tenable. "Who made the first assault" was a question for the jury under the evidence. But, upon principle, the exclusion of the testimony was not error. The opinion of the witness would not be competent evidence. The true fact might be entirely different, and the law, except in certain excepted instances not now necessary to be considered, has been settled upon the premise that the fact of character is best evidenced by proof of general reputation. The case of *People v. Kenyon*, 93 Mich. 19, 52 N. W. 1033, is relied on to sustain appellant's position. It was there held to be error to exclude evidence of the quarrelsome disposition of the prosecuting witness after the state had gone into the character and disposition of the defendant. But

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reference to that case will show that the inquiry was directed to the prosecuting witness himself when under cross-examination. It has ever been the law that one who offers himself as a witness is bound to disclose his motive and disposition. But the rule which allows this inquiry on cross-examination is not inconsistent with, but is in harmony with the rule that, if others speak of the general character of a person, it must be by way of reputation. To hold otherwise would be to substitute the judgment of a witness for that of the jury.

(5) It is complained that the court erred in giving the *entire* instructions requested by the state. Three copies of the requested instructions were not filed with the clerk, nor a copy thereof served upon defendant's counsel, as required by rule 12 of the special rules adopted by the several judges sitting in King county for the guidance of their court. It is unnecessary to quote the rule in order to show the impossibility of giving it literal application, for we have heretofore held that cases will not be reversed because of nonobservance of some rule of court. In *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175, we said:

"How far local rules of procedure are to be held binding is a question which has been variously decided by the courts of this country. 18 Ency. Plead. & Prac. 1269. But, generally speaking, it may be said that the observance of such rules lies within the discretion of the trial judge. We now recall but one case in our own reports where this question was considered. It was held, in *Washington Bank of Walla Walla v. Horn*, 24 Wash. 299, 64 Pac. 534, that a rule might 'for good reason' be suspended, implying that the reasons might rest in *gremio judicis*."

(6) The court refused to give any of the instructions requested by defendant, because, as the court held, under rule 12, they came too late. The reason assigned may not be tenable, for it would seem that a request for a proper instruction would be timely if made at any time before the court instructed the jury. But it is not contended that the instructions as given do not state the law of the case, and

unless the law is overlooked or misapplied to the disadvantage of the party, there can be no legal prejudice.

(7) This assignment goes to the refusal of the court to grant a new trial for errors in law occurring at the trial; that the verdict is contrary to the law and evidence; and newly discovered evidence. The first ground is covered by our former discussions, and the second by the rule that the weight of the evidence was for the jury. Defendant discovered, a day or two after the trial, that one Myers might have known something of the crime charged. Myers was then at Janesville, Wisconsin. Counsel for defendant sent the following telegram:

"In case State against Captain O'Brien understand you can testify as follows: Saw shooting. Two men came out of the house about the same time. The shots were fired while the larger man was prostrate. If you can testify in substance as stated wire fully at once. Answer paid."

He received the following reply:

"To Gen. Jas. B. Metcalf, Pacific Bldg., Seattle, Wash. Can swear substantially as asked but must send expense money also I have business here for at least a week."

Defendant says: "No diligence on affiant's part could have secured said evidence." Aside from the fact that appellate courts will rarely overrule the discretion of the trial court in granting or denying a motion for a new trial made on the grounds of newly discovered evidence—for the showing in support of such motions must be measured by reference to the evidence alleged to be newly discovered, the evidence as disclosed on the trial, and the probable consequences of a new trial—we think no showing of diligence is disclosed by the supporting affidavits. It is not enough to state that there was diligence. Diligence is a fact and not a conclusion, and to show it, circumstances must be set forth that the court, rather than the party, can say that there was diligence. In this case it is not even shown how or from whom the informa-

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tion was obtained, so that an inference of diligence might be drawn.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., MORRIS, CROW, and ELLIS, JJ., concur.

[No. 10054. Department Two. December 15, 1911.]

THE STATE OF WASHINGTON, *on the Relation of W. A. Coplen et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.¹

CERTIORARI—WHEN LIES—REMEDY BY APPEAL. Certiorari does not lie to review an order denying a motion to quash a summons on the ground that the service was not made in the manner prescribed by law, since the same is reviewable on appeal from the final judgment.

Application for a writ of certiorari filed in the supreme court, December 11, 1911, to review an order of the superior court for Spokane county, Webster, J., entered October 10, 1911, denying a motion to quash a summons on the ground that the service was not made in the manner prescribed by law. Denied.

Cannon, Ferris & Swan and John B. White, for relators.

Fred H. Witt, for respondent.

PER CURIAM.—The relators have applied for a writ of certiorari to the superior court of Spokane county, asking us to review certain orders made by the superior court in a case then pending before it, wherein H. R. Von Dreathen is plaintiff and W. A. Coplen and wife are defendants. From an inspection of the application and the record before us, we are of the opinion that all the questions sought to be determined upon this hearing may properly be raised upon appeal. Therefore, following the established practice of this court in such cases, the writ is denied.

¹Reported in 119 Pac. 383.

[No. 9649. Department One. December 15, 1911.]

BESSIE MAE GARLAND, *Appellant*, v. GROVER GARLAND,
Respondent.¹

DIVORCE—GROUNDS—NONSUPPORT. Under Rem. & Bal. Code, § 982, which names as ground for divorce, among others, abandonment for one year, and the neglect or refusal of the husband to make suitable provisions for his family, the two are in no way connected, and nonsupport need not have continued for one year prior to the commencement of the action; but the wife is entitled to divorce as a matter of law where, without fault on her part, nonsupport has continued for such a reasonable time as to show a settled intention to permanently refuse to support, and three months is sufficient.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered May 18, 1911, upon findings and conclusions in favor of the defendant, dismissing an action for divorce. Reversed.

Reeves & Reeves, for appellant.

DUNBAR, C. J.—This is an action for divorce brought by the wife, the appellant in the case. The cause of action alleged is nonsupport. The court, after making the jurisdictional findings of fact, found in addition:

“(3) That on the 20th day of February, 1911, the defendant without any cause whatever other than that the plaintiff and defendant had some slight words over the refusal of defendant to take plaintiff to a show, told her that from henceforth they should be nothing to each other, and on the following day wrote her a letter stating that he would no longer live with her and that he hoped it would never be necessary for them to see each other's faces again.

“(4) That thereafter and on February 23, 1911, the plaintiff endeavored to induce the defendant to live with her as her husband, and was advised by the defendant that he had no longer any affection for her and at which time the plaintiff honestly told the defendant that her love for the

¹Reported in 119 Pac. 386.

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defendant was such and her desire to continue the married relations were such that she would accompany him to their home and live with him even though he did not have any affection for her at that time, and would endeavor to gain his affection, which offer the defendant refused; and thereafter on the same or following day the defendant sent the few personal effects of plaintiff to Wenatchee.

"(5) That the plaintiff and defendant are far different in temperament and are incompatible in that the plaintiff is of a lively, vivacious and talkative disposition, while the defendant is taciturn, a man of few words and his wife talking to him annoys him.

"(6) That the defendant is a large, strong, able-bodied man, twenty-six years old and is capable of earning a good salary by manual labor, and is now and has been at all times herein mentioned enjoying good health.

"(7) That on the day prior to the commencement of this action, at the request of plaintiff, one of her attorneys had a conference with the defendant in an honest endeavor to effect a reconciliation between the plaintiff and defendant and to induce the defendant to take the plaintiff into his home again as his wife and make a further effort to continue living together as husband and wife, but all without avail, and at said conference the defendant refused to undertake a resumption of the marriage relation.

"(8) That while plaintiff and defendant were living together as wife and husband the plaintiff desired that her husband go upon a farm that was then in the possession of the defendant and reside there and make a home there for himself and his wife, which defendant refused to do, but for the greater portion of their married life lived with his parents Mr. and Mrs. J. Garland domiciling his wife in their said home, to this she objected and insisted on living unto themselves on the said farm and this caused a considerable disagreement between them.

"(9) That ever since the 20th day of February, 1911, the defendant has wholly failed to make suitable provision or any provision whatever for the support of the plaintiff and has contributed nothing whatever to her maintenance or support since said date, during which time the plaintiff has resided with her parents in Wenatchee and has worked during a portion of said time and is now so working as waitress in

the Wenatchee hotel, and she has no means of support whatever and has not had since the 20th day of February, 1911, save and except her own labor and the kindness of her parents."

The court also found that, at the time of the commencement of the action, the plaintiff was anxious and willing to live with the defendant as his wife, but he was unwilling to live with her or receive her as such, or to maintain her, and did refuse to do either, and continued his refusal down to the day of the trial. Upon the foregoing facts, the judge concluded, as a matter of law, that the action should be dismissed. From a judgment flowing from this conclusion, this appeal is taken.

Defendant did not testify at the trial, and there is no question raised upon the testimony, the only question being, do the findings support the judgment of dismissal. We are of the opinion that the court placed too limited a construction upon the statute. Rem. & Bal. Code, § 982, among other causes which will warrant a divorce, provided:

"(4) Abandonment for one year; (5) cruel treatment of either party by the other, or personal indignities rendering life burdensome; (6) habitual drunkenness of either party, or the neglect or refusal of the husband to make suitable provisions for his family."

Whatever may be said of other provisions of the statute, it seems to us that this woman has brought herself squarely within the latter part of paragraph 6, viz., the neglect or refusal of the husband to make suitable provisions for his family. The court doubtless took the view that a sufficient time had not elapsed from the time of the refusal of the husband to provide to the time of the action. It will be noticed that, while the statute provides that abandonment must continue for one year, there is no such provision with reference to the husband making suitable provision for his family. The two provisions are in no way connected. A husband may abandon his wife so far as consortium is concerned, and at

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the same time make suitable provision for her support, or he may be willing to live with her and refuse to support her. In the absence of a specified time in the provisions of the statute in relation to support, we can but hold that a reasonable time is within the contemplation of the act, and if a wife is entitled to support for one year, she is entitled to support for one month, or any time, and at all times, the only duty of the court being to determine that the time was of such duration as to reasonably show a settled intention to refuse permanently to support. The time shown by the testimony in this case, as determined from the findings of fact, was from the 20th of February until the 13th day of May, or practically three months. We think this was a sufficient time to indicate such want of support as was contemplated by the statute.

The judgment will be reversed and the lower court will grant the decree as prayed for.

PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 9684. Department Two. December 15, 1911.]

THE STATE OF WASHINGTON, *Appellant*, v. W. C. JONES,
Respondent.¹

INTOXICATING LIQUORS—LOCAL OPTION—OFFENSES—GIFTS IN STREET—STATUTES—CONSTRUCTION. The giving away of liquor on the streets of a town within a dry unit is a violation of the local option law of 1909, Rem. & Bal. Code, § 6300, providing that it shall be unlawful to sell or give away any intoxicating liquor within the limits of the unit, provided the words "give away" shall not prohibit the giving of liquor to guests in a private house; notwithstanding the further provision of Id., § 6303, aimed at gifts by dealers for the obvious purpose of evading the penalties against sales.

STATUTES—TITLE AND SUBJECT OF ACTS—INTOXICATING LIQUORS—LOCAL OPTION. The local option law of 1909, Rem. & Bal. Code, § 6292, entitled an act to provide for the submission of the question

¹Reported in 119 Pac. 384.

whether the "sale" of intoxicating liquors shall be licensed or prohibited, and providing for the enforcement of the result of elections and defining offenses thereunder, relates to but one subject sufficiently expressed in its title; and penalties for the "giving away" of liquor within a dry unit, except to guests in private houses, are germane to the subject; the word "sale" in the title not being determinative of the acts to be punished.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered April 7, 1911, dismissing a prosecution for violation of the local option law, upon sustaining a demurrer to the information. Reversed.

Frank W. Bixby and Howard C. Thompson, for appellant.

Waters & Downer and Chas. A. Sather, for respondent.

MORRIS, J.—Appeal by the state from an order sustaining a demurrer to an information charging a violation of what is commonly known as the local option law of 1909. Laws 1909, p. 153; Rem. & Bal. Code, § 6292 *et seq.* The charging part of the information material to the point submitted is:

"The said W. C. Jones at Ferndale, Whatcom county, Washington, on or about January 26, 1911, did wilfully and unlawfully give away to an adult person intoxicating liquor on the public streets of Ferndale, Washington, the said giving away being within a unit in which the giving away of intoxicating liquor was prohibited and unlawful."

To this information, a demurrer was sustained, which is supported by respondent upon two grounds: (1) The legislature did not intend to prohibit any gifts in a dry unit other than such gifts as are made for the obvious purpose of evading the provision against sales; (2) if the legislature did attempt to prohibit all gifts except within the giver's private house or apartments, that portion of the act is unconstitutional as contrary to art. 2, § 19 of the constitution: "No bill shall embrace more than one subject, and that shall be expressed in the title."

Upon the first contention the language of the act is so

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plain as to hardly call for any construction. Section 9 of the act provides in part:

"It shall not be lawful to sell, give away or in any manner dispose of intoxicating liquor, in any quantity whatever, within the limits of the unit in which the election was held [and the electors voted against license]: *Provided*, that the words 'give away' shall not be construed to prohibit the giving of intoxicating liquor to guests by a person in his private dwelling or private apartments, unless such dwelling or private apartments shall become a place of public resort." Rem. & Bal. Code, § 6300.

Section 12 reads as follows:

"The giving away, delivering or handling of any intoxicating liquor by any storekeeper at any place of business, or the taking or soliciting of orders, or the making of agreements for the sale or delivery, or for the giving away, of any intoxicating liquor within the limits of a unit which shall have voted against licensing the sale of intoxicating liquors therein, or any other device to evade the provisions hereof, shall be deemed an unlawful sale of intoxicating liquor, and any person guilty thereof shall be punished as provided in the preceding chapter." Rem. & Bal. Code, § 6303.

If § 12 stood alone, it might be subject to the construction contended for by respondent, that the gift sought to be prohibited was one made for the obvious purpose of evading the provision against sales, and was manifestly intended to cover any device resorted to for the purpose of evading the provision prohibiting sales within dry units. Section 9, however, answers such contention. While § 12 covers a gift made for the purpose of evading the restriction against sales, § 9 can have no meaning unless, as plainly expressed within its terms, it was there intended to write a prohibition against all gifts irrespective of their purpose, or by whom made, excepting within the language of the proviso, gifts made to guests within private dwellings or apartments. The whole scheme of disposing of intoxicating liquor contrary to the evident intention of the law is covered in these two sections, and the only lawful disposition of liquor within a dry unit

is the gift to a guest within one's private home. As was said in *People v. Myers*, 161 Mich. 40, 125 N. W. 701:

"The local-option law was intended in my opinion, not only to wipe the business out of existence in the county, but to prevent the inhabitants of the county from obtaining liquor within the county. For the latter purpose, the act prohibits any person from giving away intoxicating liquor, and thereby heads off the numerous subterfuges which would interfere with the enforcement of the law."

If respondent's contention be given effect, any person within a dry unit could load a dray with liquor, and stand on the street corner and give to all who would receive, intending thereby an act of hospitality or good fellowship, as he contends the act charged was, or as an expression of sympathy with the dry throats of those who were wont to indulge in the use of liquor whenever opportunity afforded. All he need do to obtain the law's protection would be to refuse recompense either directly or indirectly, except the gratitude of those to whose appetite he had administered. Such a construction would make the law a farce, and dry units an abomination. It hardly needs argument to convince that such was not the intention of the legislature in passing an act giving to the people of each unit the right to restrict not only the sale but the use of intoxicating liquor, except within the privacy of the home. We therefore hold that any gift of intoxicating liquor within any dry unit is a violation of law, except it come within the only exception made in the act; a gift to guests within a private dwelling or apartment. A similar holding under like statutes may be found in: *State v. Danforth*, 62 Vt. 188, 19 Atl. 229; *People v. Myers*, *supra*; *People v. McCall*, 161 Mich. 674, 126 N. W. 1052; *People v. Bedell*, 127 Mich. 33, 127 N. W. 33.

Neither can we subscribe to respondent's second contention that, if it was the intent of the legislature to prohibit gifts of liquor in dry units, except within private dwellings or apartments, the expression of such intent is unconstitu-

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tional, as not within the title of the act. The title to the act is:

"An act to provide for the submission to the qualified electors of the question whether the sale of intoxicating liquors shall be licensed or prohibited, providing for the enforcement of the result of the elections hereunder, defining offenses hereunder, and providing penalties therefor."

In determining the subject of a criminal statute, within the meaning of the constitutional provision, it can generally best be perceived by ascertaining the evil the law seeks to remedy, and the act it seeks to penalize. It is apparent from the wording of the title that the legislature is making provision for determining the manner in which the will of the people as to the sale of liquors shall be ascertained and determined, and when so determined, how that will shall be enforced, and the results of the election preserved. The act contains but one subject, the regulation of the liquor question by the qualified electors. In effecting its purpose, the act contains many provisions; but so long as these provisions, or any of them, are germane to the general subject of the act and are consistent with the regulation which is made the subject of the act, they are within its title, although no specific reference be there made to them.

It is just as much within the power and intent of the legislature, in specifically "providing for the enforcement of the result of the elections hereunder," as it has in this title to say that gifts as well as sales shall be penalized. The word "sale" in the title is not determinative of the only act penalized. Its limitation is found in the submission to the people, "of the question whether the sale of intoxicating liquors shall be licensed or prohibited." If the verdict shall be for prohibition, then the title contains provisions for the enforcement of the result, and gives notice that the act defines offenses and violations.

There is no necessity, under any constitutional provision, of burdening the title with all the provisions contained in

the act for its enforcement, nor defining its offenses, since it satisfies the constitutional provision by giving notice that it does contain provisions for the enforcement of the law, and does define offenses thereunder. The nature of such provisions, or the character of such offense, can be safely left to the sections of the act. Otherwise, no act could be more descriptive nor comprehensive than its title. It is, therefore, clearly within the subject and title of the act to provide for its enforcement by penalizing gifts of intoxicating liquors within dry units, except within private dwellings or apartments. The constitutional requirement that an act shall embrace but one subject is intended to prevent hiding away in the body of the act matters not related to the subject the act is intended to deal with, and of which the title when read gives no indication. The further provision that the subject shall be expressed in the title does not require that the title shall be an index to the act, nor make special reference to all its provisions. *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893; *State ex rel. Zenner v. Graham*, 34 Wash. 81, 74 Pac. 1058; *Johnston v. Wood*, 19 Wash. 441, 53 Pac. 707; *Percival v. Cowychee & Wide Hollow Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *In re Donnellan*, 49 Wash. 460, 95 Pac. 1085.

In the following cases it has been held that a gift of intoxicating liquor may be penalized under a statute whose title only provided for the regulation or prohibition of its sale. *State v. Adamson*, 14 Ind. 296; *Stickrod v. Commonwealth*, 86 Ky. 285, 5 S. W. 580; *State v. Deusting*, 33 Minn. 102, 22 N. W. 442, 53 Am. Rep. 12; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Thomasson v. State*, 15 Ind. 449. In the *Adamson* case the court well says:

"When we consider the object for which such a law was passed, viz., to prevent abuses that might flow from the unrestrained disposal of liquors in these respects, it would seem

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that the giving away, under circumstances which might produce the same evil results as the selling, would be a matter properly regulated in connection with the selling. Indeed, it may be regarded as a necessary incident to a statute regulating the sale, to secure its efficient operation. It is a necessary precautionary provision to prevent evasion of the prohibition to sell. All experience under license laws proves this."

Similar rules are announced in: *State v. Owens*, 9 Kan. App. 595, 58 Pac. 240; *Luck v. Sears*, 29 Ore. 421, 44 Pac. 698, 54 Am. St. 804, 32 L. R. A. 738. See, also, note to *Crookston v. Board of County Com'rs* [79 Minn. 283, 82 N. W. 586], 79 Am. St. 453.

It is conceded that cases may be found holding that a gift is not included within a title regulating sales of intoxicating liquor. Those cases, however, follow an extreme, technical construction of constitutional provisions as applied to the title of acts which this court has never adopted. We are not, therefore, now disposed to follow them, based as they are upon views contrary to those so oft expressed by this court in construing this constitutional requirement. It follows that the judgment is reversed.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 9695. Department Two. December 16, 1911.]

W. A. SCHWAB, *by his Guardian etc., Respondent*, v.

ANDERSON STEAMBOAT COMPANY, *Appellant*.¹

NEGLIGENCE—DANGEROUS PREMISES—ISSUES AND PROOF—FAILURE OF PROOF. In an action for personal injuries sustained through the fall of a swing, predicated upon the allegations that the defendant owned and controlled the park where the injury happened and maintained the swing, there can be no recovery where all the evidence showed the swing to be outside the park and not within defendant's control; and a verdict for plaintiff cannot be sustained on the theory that, there being no dividing line, the public might regard the place as within the park (CHADWICK, J., dissenting).

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 1, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through the fall of a swing, after a trial on the merits. Reversed.

Byers & Byers, for appellant.

Peterson & Macbride, for respondent, to the point that appellant was liable for the condition of the swing, cited: 29 Cyc. 466, 476; *Neel v. King County*, 53 Wash. 490, 102 Pac. 396; *Selinas v. Vermont State Agr. Soc.*, 60 Vt. 249, 15 Atl. 117, 6 Am. St. 114.

MORRIS, J.—Respondent, a minor twenty years of age, was injured July 4, 1910, by falling from a swing, which it is alleged was in Fortuna park, on Mercer island. The park was alleged as under the ownership and control of appellant, and the swing as one maintained by it within the park. The tree from which hung the rope respondent was using as a swing was shown by all the evidence, both that given by appellant and respondent, to be outside the park. In fact, there was no contention that it was within the park or

¹Reported in 119 Pac. 614.

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nearer to it than seventy-five feet; respondent's theory on the trial seemingly being that, there being no dividing line between the park proper and the outside territory in which the swing was, the public might regard all the ground as within the park, and subject to the control of appellant. It might be that a case could be predicated upon such a theory. But this one is not. It depends for its success upon proof that appellant owned or controlled the place where the injury happened, and maintained the swing. The court took this view of it, in the charge to the jury to the effect that, if the place where the respondent fell was outside of the ground controlled by appellant, there could be no recovery. When, however, he was asked to take the case from the jury because of the failure to show the place of the injury under the control of appellant, he thought the question, as one of fact, should be submitted to the jury, because there was testimony that the place of the accident was Fortuna park. While it is true the respondent testified the accident happened at Fortuna park, he at the same time described the tree to which the rope was attached; and this tree is shown by all the testimony to be outside of the park, and not within the control of appellant. There was no dispute as to this fact in the evidence, and the court should have so held on appellant's motion.

There being no proof of the fact upon which respondent relied to establish a liability against appellant, the case should have been dismissed on appellant's motion.

Judgment reversed, and the cause remanded with instructions to dismiss.

DUNBAR, C. J., CROW, and ELLIS, JJ., concur.

CHADWICK, J. (dissenting)—I am unable to agree with the opinion of the majority. The appellant operated a certain park, situated on Mercer Island, in Lake Washington, as an adjunct to its business of steamboating. This park was given over to the use of the public and to lodges and

societies of like nature, for picnic purposes. It was so used on the Fourth of July by the Ancient Order of United Workmen. Respondent was an attendant at the picnic, and while there, was injured by falling from a swing that, as it now transpires, was a short distance beyond the line of the park proper; although it appears from the testimony that there were tables and other paraphernalia incident to picnic grounds even beyond the swing, so that the swing was an invitation to any one inclined to take that sort of exercise or recreation.

I confess that I am unable to find any case directly in point that would sustain my theory that the appellant is liable, but in reason it would seem that it should be so. I can see no difference in principle between this case and that of *Neel v. King County*, 53 Wash. 490, 102 Pac. 396, where a judgment was sustained, although the defect in the highway was beyond the limit of the county's property. The court there said that the doctrine upon which a recovery was allowed was that of simple justice and fair play, and estoppel to deny responsibility where the county had, in effect, issued an invitation to the public to use the property adjacent to the highway as a part of the road, there being no defined boundary between the road and the place where the public was invited to go. In my judgment respondent was warranted in the assumption that the swing was a part of the park playground, and to hold that he is bound by an arbitrary, unmarked line is to put a premium upon the negligence of those whose duty it is to safeguard all who come to their place for amusement and recreation. Appellant knew its boundary lines and it was within its power to define them. The court's decision puts the injured party to the burden of knowing them at his peril.

For these reasons, I dissent from the majority opinion.

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[No. 9764. Department One. December 16, 1911.]

R. B. BROWN, *Appellant*, v. GEORGE F. ROGERS *et al.*,
Respondents.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting testimony, supported by the evidence, will be sustained on appeal.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 14, 1911, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action on contract. Affirmed.

Walter S. Fulton, George V. Ostroth, and R. B. Brown,
for appellant.

E. H. Kohlhasse, for respondents.

PARKER, J.—This is an action to rescind an executed trade contract, by which the plaintiff traded to the defendant Kidd certain rooming house furniture, and the business in which it was used, for certain land and \$100 in cash. A trial upon the merits resulted in a decree in favor of the defendants, dismissing the case, from which the plaintiff has appealed. The trial court made no findings.

The grounds upon which appellant seeks a rescission of the contract are that he was induced to enter into the contract by false and fraudulent representations made by certain of the defendants, touching the condition, location and value of the land. The evidence warrants the conclusion that the value of the property exchanged, including the money, was about equal on each side, and there is serious conflict in the testimony of the witnesses as to the making of false representations by respondents inducing the trade. We agree with the learned trial court that appellant is not

¹Reported in 119 Pac. 1135.

entitled to the relief prayed for. No useful purpose could be served by a detailed review of the evidence here.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 9576. Department One. December 16, 1911.]

W. F. GRINDEMAN, *Appellant*, v. WOODLAND SHINGLE
COMPANY, *Respondent*.¹

WORK AND LABOR—CONTRACTS—PERFORMANCE OR BREACH—TERMINATION—DAMAGES—MEASURE. Under a contract to work for one year, the employee to forfeit all pay if he breached the contract, and to receive no compensation while sick or disabled, in an action for the compensation and wrongful discharge, a verdict that he was not damaged, limited to the sum due at the time he quit, is warranted, where there was evidence that he quit when sick and disabled, and could not have earned any more under the contract than he did elsewhere during the term, and also that the contract was voluntarily terminated by mutual consent.

Appeal by plaintiff from a judgment of the superior court for King county, Tallman, J., entered December 14, 1910, upon the verdict of a jury rendered in favor of the plaintiff for a portion of his claim, in an action upon a contract for services. Affirmed.

E. H. Guie, for appellant.

J. P. Wall, for respondent.

PARKER, J.—The plaintiff seeks to recover a balance alleged to be due him for work, and also damages alleged to have resulted to him from his discharge by the defendant from employment under the following contract:

“Labor Contract.

“W. F. Grindeman, as first party, agrees with the Woodland Shingle Company, a corporation, as second party, as follows:

¹Reported in 119 Pac. 615.

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"Second party agrees to employ first party as sawyer in shingle mill of second party in Seattle, Washington, and agrees to pay first party for his labor as follows: Five and one-half ($\$0.05\frac{1}{2}$) cents per thousand for each thousand shingles cut per day in said mill by the said first party and guarantees that said first party shall receive a minimum payment each labor day in said mill of seven ($\$7$) dollars per day.

"First party agrees to work for second party for said wages and further agrees to work every day that said mill is in operation during the year ending December 30th, 1909, and devote his time and energy to his labor in a diligent and faithful manner.

"It is agreed that in the event that the straight shingle mills of Ballard shall shut down that the period of shut down shall not be taken as earning anything in favor of first party but in the event that any one of the straight shingle mills of Ballard shall run then it is agreed that said minimum sum of seven dollars shall become due and payable to first party for each working day during said time.

"First party herewith deposits with the second party his promissory note payable on demand for fifty ($\$50$) dollars without interest as security for faithful performance of this contract and further agrees that in the event that the same shall be violated in the party of the first part that all moneys due or owing to first party from second party at the time of violation of said contract shall be forfeited together with said note as liquidated damages. And it is further agreed that in the event that first party is sick or disabled in any manner that he shall receive no profits under this contract.

"Witness the hands of the parties hereto this the 23rd day of February, 1909.

"(Signed) W. F. Grindeman, Woodland Shingle Co.,

"By L. J. Hamel, Pt."

The substance of the plaintiff's claim is that he was discharged without cause by the defendant on August 28, 1909, at which time there was due him for work under the contract $\$110.48$; and that, had he been permitted to remain in the defendant's employ until the end of the year under the

contract, he would have earned \$885.50 additional, during which time he was able to earn elsewhere only \$154.75. The difference he claims to be the measure of his damages resulting from his discharge. The substance of the defendant's defense is that the plaintiff breached the contract by quitting his work under the contract without cause, and thereby forfeited the balance due him at that time, and also thereby entitling the defendant to judgment against him upon the note for \$50 delivered with the contract as security for its performance. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff for \$110.48, which it will be noticed is the exact sum claimed to be due him at the time he ceased to work. The plaintiff has appealed from this judgment.

It is contended by counsel for appellant that, since the jury found in his favor for this balance, it follows that respondent breached the contract and therefore became liable to appellant for seven dollars per day for the entire unexpired term of the contract, less the amount he earned elsewhere during that time. He asks us to direct judgment to enter accordingly, or grant him a new trial. The evidence tends strongly to show that, at the time appellant ceased to work, he was sick and unable to work, and that he so continued for a large part of the remaining portion of the year. This evidence was ample to warrant the jury in believing that appellant would not have been entitled to compensation for a considerable portion of the unexpired time of the contract, in view of its concluding provision that he was not to receive compensation when sick or disabled. The evidence does not show that appellant would have earned during the unexpired term any more than the \$154.75 he earned elsewhere, even had he worked for respondent under this contract during the whole time he was not sick or disabled. Therefore, the jury were fully warranted in concluding that appellant was not damaged, even conceding that he was discharged without cause.

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A careful reading of the evidence also convinces us that it supports the conclusion that, at the time appellant ceased to work for respondent, he did so by mutual consent of himself and respondent, and that thereafter neither made any demands upon the other looking to a continuance of their contract obligations, except as appellant demanded compensation for the unexpired time by bringing this action. This theory of mutual termination of the contract was not urged by respondent upon the trial, as it was claiming a breach of the contract by appellant; but we think, nevertheless, that the jury might legitimately arrive at their conclusion upon this theory. Either of these theories will support the verdict and judgment.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9607. Department One. December 16, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.

WILLIAM A. COPELAND, *Appellant*.¹

CRIMINAL LAW—APPEAL—REVIEW—VERDICT. A conviction for assault with a weapon likely to do bodily harm will not be disturbed on appeal on the ground that the assault was justified, where that depends upon the credibility of witnesses and the evidence was conflicting.

CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE—REBUTTAL. It is not an abuse of discretion to permit testimony on the part of the state in rebuttal which was cumulative of the state's evidence in chief, where it went but little beyond direct contradiction of the defendant's testimony of self-defense.

INDICTMENT AND INFORMATION—DEGREES OF OFFENSE—FIRST AND SECOND DEGREE ASSAULTS—STATUTES. A conviction of assault with a weapon likely to produce bodily harm, within Rem. & Bal. Code, § 2414, subd. 4, may be had under an information charging an as-

¹Reported in 119 Pac. 607.

sault with a shot gun by shooting with intent to kill, under Id. § 2413, subd. 1; as the former is necessarily included within the latter, within the requirements of Id. § 2168.

CRIMINAL LAW—TRIAL—INSTRUCTIONS. Upon an information for assault with intent to kill, it is not error to refuse to instruct as to assault and battery, where the evidence conclusively shows that defendant was guilty of first or second degree assault or not at all.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 3, 1911, upon a trial and conviction of assault with a weapon likely to do bodily harm. Affirmed.

James J. McCafferty (*M. J. Costello*, of counsel), for appellant.

John F. Murphy, *Hugh M. Caldwell*, and *H. B. Butler*, for respondent.

PARKER, J.—The defendant was charged, by information filed in the superior court for King county, with the crime of assault in the first degree as follows:

"He, said William A. Copeland, in the County of King, State of Washington, on the 12th day of September, A. D. 1910, did wilfully, unlawfully, and feloniously make an assault upon one Walter C. Knapp with a firearm, to wit, with a shot gun then and there loaded with shot, which he, said William A. Copeland, then and there had and held and did then and there wilfully, unlawfully and feloniously, with said shot gun, shoot at, toward and into the body of said Walter C. Knapp, with intent then and there wilfully, unlawfully and feloniously to kill said Walter C. Knapp."

The trial resulted in a verdict and judgment against the defendant convicting him of assault in the second degree, from which he has appealed to this court.

It is first contended that the trial court should have directed a verdict of acquittal in appellant's behalf. This seems to be rested upon the theory that it can be determined, as a matter of law, from the evidence, that the assault made by appellant upon Knapp was justifiable upon the ground

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of self-defense. A careful reading of the evidence convinces us that this was clearly a question for the jury. There is abundant evidence in the record to support the view that the assault was without legal justification. This contention only involves the credibility of witnesses, even assuming that appellant made out a *prima facie* case of self-defense, which we regard as somewhat doubtful.

It is next contended that the trial court erred in admitting certain testimony offered by the prosecuting attorney in rebuttal. The argument seems to be that it was erroneously admitted because it should have been offered in chief. An examination of this testimony shows that it went but little, if any, beyond being in direct contradiction of the testimony offered in appellant's behalf upon which his theory of self-defense was rested. This testimony was admissible in so far as it contradicted that testimony; and so far as it went beyond that it was at most only cumulative of the state's evidence in chief. This would, in any event, present only a question of the trial court's discretion, which was clearly not abused. *State v. Klein*, 19 Wash. 368, 53 Pac. 364; 12 Cyc. 557.

It is next contended that the judgment is erroneous in that a conviction of assault in the second degree cannot lawfully be had under this information. This presents the inquiry, Is the crime of assault in the second degree necessarily included in the crime of assault in the first degree, as charged in this information? An affirmative answer to this question will necessarily sustain the conviction under Rem. & Bal. Code, § 2168. The acts constituting assault in the first degree, in so far as we need notice such acts here, are defined by Rem. & Bal. Code, § 2413, as follows:

"Every person who, with intent to kill a human being, . . . (1) Shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death; . . . shall be guilty of assault in the first degree."

The information charges this crime against the appellant, charging both the assault with a firearm and the intent to kill. The acts constituting assault in the second degree, in so far as we need notice such acts here, are defined by Rem. & Bal. Code, § 2414, as follows:

“Every person who, under circumstances not amounting to assault in the first degree— . . . (4) Shall wilfully assault another with a weapon or other instrument or thing likely to produce bodily harm; . . . shall be guilty of assault in the second degree.”

It will be noticed that assault in the second degree does not involve any particular intent, as does assault in the first degree, and therefore of course does not require the charge of any particular intent in the information, as is necessary in charging assault in the first degree. It seems plain then that, if we ignore the allegation of this information of the particular intent to kill, we have a complete and perfect charge of assault in the second degree; because there is still left in the information a charge of facts constituting assault in the second degree under the provisions of § 2414 above quoted. This view is supported by the following authorities: *Clark v. Territory*, 1 Wash. Ter. 68; *White v. Territory*, 3 Wash. Ter. 297, 24 Pac. 447; *State v. Klein*, 19 Wash. 368, 53 Pac. 364.

Counsel for appellant rely upon *State v. Ackles*, 8 Wash. 462, 36 Pac. 597, where this court held, under an information charging assault with intention to commit murder, that the accused could not be convicted of an assault with a deadly weapon with intent to do bodily harm. The reason of that decision, however, is found in the fact that the supposed lesser crime which the jury assumed to find the defendant guilty of, was, by statutory definition, found to include elements which were not covered by the information, nor were they necessarily included in the crime of assault with intent to commit murder. As stated by the court in that opinion, at page 465:

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"Under our statute, an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury is made a felony only upon the express condition that the assault is without considerable provocation, or where the circumstances of the assault show a wilful, malignant and abandoned heart. Penal Code, Sec. 23. And where an act is punishable in a particular manner, under certain conditions, these conditions must be set forth so as to show that the act is punishable. I Whart. Crim. Law, § 192."

These elements the court concluded were not covered by the information, and were not necessarily included in the higher crime charged. In the present case, the lesser crime is not distinguishable from the higher by having as an element thereof a different particular intent, or any other different element, as in the *Ackles* case; but it is distinguishable from the higher crime charged only by the absence of a particular intent, and by the use of a weapon "likely to produce bodily harm," instead of one "likely to produce death." Of course a weapon likely to produce death is also one likely to produce bodily harm. The case of *State v. Snider*, 32 Wash. 299, 73 Pac. 355, while adhering to the views expressed in *State v. Ackles*, also shows how the lesser offense of assault and battery is included in the charge of assault with intent to kill made in that case. There the court, by eliminating the element of intent, held that the information contained a complete charge of assault and battery. This theory, we are of the opinion, will support this conviction.

It is finally contended that the trial court erred in the declining to charge that the defendant might be found guilty of assault and battery. This was not error, because the evidence conclusively shows that the defendant was guilty of assault in the first or second degree, or was not guilty of any crime.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9906. Department One. December 16, 1911.]

WILLIAM HAYTON *et al.*, Respondents, v. SEATTLE BREWING
& MALTING COMPANY, Appellant.¹

LANDLORD AND TENANT—LEASE—SALOON PREMISES—TERMINATION—ADOPTION OF LOCAL OPTION. The adoption of local option prohibiting the sale of liquors in a town does not terminate a lease of premises used for a saloon, or relieve the lessee from the payment of rent, where the lease merely provided that the lessee may conduct a saloon on the premises in conformity to the ordinances of the town and the laws of the state then in force or thereafter enacted; since it is merely permissive and not restrictive as to the uses to which the property may be put.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 14, 1911, upon findings in favor of the plaintiffs, in an action for rent, upon sustaining a demurrer to an affirmative defense, after a trial on the merits. Affirmed.

Wm. A. Greene and *Geo. McKay*, for appellant.

Thomas Smith and *J. L. Corrigan*, for respondents.

PARKER, J.—This is an action to recover two months' rent claimed to be due to the plaintiffs from the defendant under a lease to it of a lot and building in Mount Vernon. From a judgment in favor of the plaintiffs, the defendant has appealed.

The questions here presented arise upon appellant's affirmative defense, the demurrer thereto of the respondents, and the sustaining of that demurrer by the trial court. The affirmative defense thus excluded was, in substance, as follows: The term of the lease is five years, being from November 9, 1907, to November 9, 1912, at an agreed monthly

¹Reported in 119 Pac. 739.

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rental of \$100. The only provision of the lease relating to the use of the premises by appellant, is the following:

"It is further understood and agreed that the said party of the second part may during the life of this lease carry on and conduct a retail saloon business in the building now on the north part of said lot four provided, that the conducting of said business is done in conformity with all ordinances of the city of Mount Vernon, now in force or that may hereafter be enacted, as well as all laws of the state of Washington now in force or that may hereafter be enacted."

Under the local option law of 1909, Rem. & Bal. Code, §§ 6292-6314, there was submitted to the electors of the city of Mount Vernon in November, 1910, the question of whether or not the sale of intoxicating liquors should be licensed in that city. Thereupon the electors voted against such licensing, thereby rendering the sale of intoxicating liquors unlawful in that city thereafter. The rent sued for accrued thereafter. Appellant abandoned the premises and tendered possession thereof to respondents before the accruing of these rent installments sued upon.

It is contended that the trial court erred in holding that these facts did not constitute a defense to respondent's claim of rent due under the lease. It is argued that the purpose for which the premises were leased becoming unlawful upon the result of the local option election being ascertained, the lease contract thereby ceased to be binding upon appellant. It seems to us that this argument is rested upon an erroneous view of the effect of the language of the lease relating to the use of the premises by appellant. It is apparently assumed by counsel for appellant that the provisions of the lease above quoted restricts the use of the premises to saloon business. We think that provision does not have such an effect. It is only permissive in that respect, and clearly does not prevent appellant from using the premises for any lawful purpose. The decisions of the courts appear to be harmonious in support of the view that, under such cir-

cumstances as are disclosed by this defense, the lessee cannot regard the lease as terminated by the changed legal status of the liquor traffic, and thus avoid payment of the rent agreed upon by the terms of the lease. The following appear to be directly in point, involving leases where the use of the premises for saloon purposes was merely permissive, as in this lease: *Kerley v. Mayer*, 10 Misc. Rep. 718, 31 N. Y. Supp. 818, affirmed by Court of Appeals in 155 N. Y. 636, 49 N. E. 1099; *O'Byrne v. Henley*, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496; *San Antonio Brewing Ass'n v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368. In the following cases the courts express the view that the lessee would be held liable for the payment of the rent under such circumstances as we have here, even though by the terms of the lease the use of the premises be restricted to the saloon business: *Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498; *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197; *Hecht v. Acme Coal Co.* (Wyo.), 113 Pac. 788. The last cited case, decided in February, 1911, contains an exhaustive review of the law upon the subject.

Counsel for appellant rely upon *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S. W. 364, 130 Am. St. 753, 19 L. R. A. 964. This is the only decision coming to our notice which seems to be not wholly in harmony with those above cited. It is not plain from the language of that decision just what the provisions of the lease were as to the use of the premises by the lessee, but it may be inferred from the language of the court that it regarded the lease as restricting the use of the premises to saloon purposes. If we are correct in this assumption, that decision would not necessarily be out of harmony with an affirmance of this judgment, since we conclude that this lease did not so restrict the use of the premises, but that its provisions in

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that respect were merely permissive. That decision, however, does not seem to be in accord with the weight of authority upon this subject, even though it may be distinguishable from the case before us. The result reached by this court in *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 Pac. 630, is in harmony with the result reached by the trial court in this case, though this exact question was not there involved. We are of the opinion that the learned trial court was not in error in declining to entertain appellant's affirmative defense.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9733. Department One. December 16, 1911.]

RICHARD MALLET, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.¹

STREET RAILWAYS — NEGLIGENCE — COLLISION WITH PEDESTRIAN — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. In an action for personal injuries sustained by a pedestrian run down from behind by a street car, the negligence of the defendant and the contributory negligence of the plaintiff are for the jury, where it appears that plaintiff in the daytime was lawfully using the street car tracks, there being no sidewalks in the street, that he crossed to the east tracks upon meeting a car on the west tracks, and then looked back where he could see for a distance of nine hundred feet and saw no car approaching, and after going about thirty or forty feet, was struck by a car going at a high rate of speed which gave no alarm in time to enable him to escape; although on the evidence offered by the defendant, the jury might have found that the accident happened in an entirely different way without any fault of the defendant; since plaintiff was not a trespasser and the motorman would not be justified in running him down without warning.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. The trial court having exercised its discretion to refuse a new trial, the supreme court is not justified in granting a new trial upon conflicting evidence that made a case for the jury.

¹Reported in 119 Pac. 743.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 14, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by a pedestrian struck by a street car. Affirmed.

Will H. Thompson and Morris B. Sachs, for appellant.

Heber McHugh and John T. Casey, for respondent.

MOUNT, J.—Action for personal injuries. The plaintiff was struck by one of defendant's cars, running upon the easterly track of a double-track electric line, on Rainier avenue, in the southerly part of Seattle. His left leg was broken, and he received other injuries. The case was tried to a jury. At the close of the plaintiff's evidence, a motion for a nonsuit was made and denied. At the close of all the evidence, the case was submitted to a jury, and a verdict was rendered for the plaintiff. The motion for new trial was made and denied, and judgment followed. This appeal is prosecuted by the defendant from that judgment.

Two assignments of error are made, (1) that the court erred in denying defendant's motion for a nonsuit; (2) that the court erred in overruling defendant's motion for a new trial. In considering the first assignment, we must take the evidence offered in behalf of the plaintiff as the facts in the case. It appears therefrom that the defendant maintains a double-track electric street railway, upon Rainier avenue, from south of Court street north. This avenue extends in a northerly and southerly direction. On the east side, the avenue was paved or covered with planking sixteen feet in width, for street travel. There were no sidewalks for pedestrians upon either side of the avenue. This planking abutted up to the lower part of the ties of the easterly track of the street railway. The two tracks of the railway were some twelve inches—or possibly more—higher than the planking. Between the two tracks the ground was uneven. On the westerly side of the tracks, the street was not

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improved or used. It was the custom of pedestrians living south of Court street to use the tracks for travel to the north.

On the afternoon of August 4, 1909, the plaintiff intended to go from Court street to the post office, about a block north. He entered upon the westerly track of the railway. The day was clear and bright and the way was dry. He traveled some forty or sixty feet either between the rails of the westerly track or between the two tracks, when he saw a car coming toward him from the north. He thereupon crossed over to the easterly track. After this car passed, he looked back toward the south, but saw no car upon the easterly track. At that point the cars going south occupied the westerly track and those going north occupied the easterly track. The tracks were level and straight, so that one could see a car from Court street south about nine hundred feet, and north three hundred feet—possibly more.

After plaintiff crossed over onto the easterly track, he proceeded to walk north on the track. When he had gone a short distance, probably thirty or forty feet, he heard a shout and a bell, and turning to the right saw a north-bound car so close upon him that he did not have time to escape from the track. The car struck him and threw him to the planked part of the street. He was rendered unconscious. The car was stopped so that the rear platform of the car was opposite where he lay. There was evidence that the car which struck the plaintiff was running very fast. One witness put the speed at thirty miles per hour. This estimate, we think, was much exaggerated.

Counsel for appellant argue that the street car track was of itself a danger signal, and that the plaintiff in using the same as a foot path was obliged to use his senses and keep out of the way of approaching cars. It is no doubt true that the plaintiff was obliged to use his senses, and if he knew or, in the exercise of ordinary care, should have known that a

car was coming down upon him, either in front or from behind, it was his duty to avoid danger. The defendant was not a trespasser. He was rightfully in the street and upon the track. And while he was required to use his senses and take notice of the fact that cars were in use upon the street railway tracks, he was not required to use the same degree of care as a man upon a private way or upon a steam railway. *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601. In that case we said:

"It is a well-established rule of law that a pedestrian is not charged with the negligence of street car operators, but that he is justified in basing his calculations and ordering his movements on the assumption that the car will be operated, not only in conformity with local laws regulating it, but with the highest degree of care and a due regard for the safety of the traveling public, who are equally with it entitled to use of the streets."

And in *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488, we said:

"If the motorman sees a clear track and has no occasion to stop and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing."

We think this rule applies in this case. The plaintiff, according to his testimony, was walking upon the street car track. He got out of the way of a car coming toward him in front. After that car passed by him, he looked down the track behind him and saw no car coming. The car which a little later struck him was no doubt somewhere near the car which had just passed him. The question whether he should have seen this car depends, of course, upon the distance it was away and was, we think, a question for the jury. But certainly, if the plaintiff was walking upon the track

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with his back to the on-coming car, he was in plain view of the motorman, who must have seen him. No doubt the motorman had a right to suppose that the plaintiff would clear the way for the car before the car reached him, but it was the duty of the motorman to give some alarm so as to call the attention of a man of ordinary senses upon the track to the fact that the car was approaching him. In other words, the motorman would not be justified in running down a pedestrian without some warning in time for the pedestrian to escape.

Appellant relies upon *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830, and other cases of that character. These were all crossing cases where the injured parties placed themselves immediately in front of cars which were known, or should have been known, to be approaching. These cases are entirely different from this, because here, if the plaintiff's story is true, he was run down without warning given in time for escape and without knowledge of the approach of the car. We think the questions of negligence of the defendant and of the plaintiff were for the jury.

Appellant argues upon the second assignment of error that the whole evidence shows that the plaintiff is not entitled to recover, and therefore the court should have granted a new trial. The evidence on behalf of the defendant tends to show that the plaintiff was returning from the post office instead of going there; that he was traveling south instead of north; that he was walking upon the planked part of the street to the east of the east railway track, facing the on-coming car, in a place of perfect safety; that just before the car reached him, he turned to his right and attempted to step with his left foot upon the track almost immediately in front of the car; that the bell was sounded and the motorman and a passenger upon the car called loudly to him. The motor was reversed, but plaintiff being so close to the

car was struck and injured when there was no opportunity to stop the car. There is ample evidence and circumstances in the record to show that the injury occurred in that way. If it did so occur, the defendant was not liable under the cases cited by appellant and noticed above. This is a case where the jury must discredit the whole of the evidence on one side or the other, in so far as it relates to the manner of the injury. If the truth is as related by witnesses for the defendant, plaintiff was clearly not entitled to recover. The question was one for the jury, and the jury having found for the plaintiff, and the trial court having refused to exercise his discretion and grant a new trial, as he might have done, we feel that we are not justified in doing so.

The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9746. Department One. December 16, 1911.]

C. E. TAFT, *Respondent*, v. H. W. RUTHERFORD *et al.*,
Appellants.¹

BOUNDARIES—LIABILITY OF SURVEYOR—ERRONEOUS SURVEY—NEGLIGENCE. Where a surveyor was employed to establish the lines of a lot for the purpose of erecting thereon an apartment house, and such a house, not an expensive one of its kind, was erected in reliance on the survey, the surveyor is liable in damages for the cost of removal of the building where, through negligence and error in the survey, the house was placed five feet in the street, and the owner was compelled to move it.

SAME—NEGLIGENT SURVEY—DEFENSES. Where a surveyor was employed to make an accurate survey of a lot for the purpose of erecting thereon an apartment house, he cannot escape liability for negligence by showing that the survey was not guaranteed and that it was customary to give a certificate of accuracy upon the payment of a larger fee than he was paid.

¹Reported in 119 Pac. 740.

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SAME—EVIDENCE—PROOF OF NEGLIGENT SURVEY—SUFFICIENCY. In an action against a surveyor for damages from an erroneous survey of a lot, negligence is shown by evidence that the survey was wrong and that the parking strip was overlooked or the figures on the chain misread.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 1, 1911, upon findings in favor of the plaintiff, in an action in tort, after a trial to the court without a jury. Affirmed.

Arthur R. Rutherford and *Austin E. Griffiths* (Paul *Shaffrath*, of counsel), for appellants.

S. A. Keenan, for respondent.

MOUNT, J.—This case was tried to the court without a jury. The court entered a judgment in favor of the plaintiff for \$1,267.50, on account of damages sustained by an erroneous survey of the plaintiff's lot by the defendants. The defendants have appealed.

It appears that the defendants are civil engineers. The plaintiff owned a certain lot in the city of Seattle, upon which lot he desired to construct an apartment house. He employed the defendants to survey the lot and to give him the correct lot lines and street elevations. The defendants did survey the lot and set stakes upon the ground, and made a profile or plat showing the location of the lot lines and the street elevations, and delivered the same to the plaintiff, who paid the fee charged therefor—\$12. There is some dispute in the evidence as to whether the defendants were informed of the character of the house which plaintiff desired to construct. The court found upon this question:

"That, at the time of the making of said contract, the erection of a building on said ground was mentioned, and defendants then knew, or had sufficient information at that time to lead them to know, that said survey was desired to guide the plaintiff in the erection of a building on said

ground; (4) that plaintiff desired said survey and profile for the sole purpose of ascertaining the correct outlines of said property before erecting thereon an apartment house as the defendants then knew."

The plaintiff relied upon the survey as made, and constructed an apartment house on the lines as fixed by defendants upon the ground. After the building was about completed, the city of Seattle notified defendants that the front of the building was located about five feet in the street, and he was notified to remove the building. Plaintiff thereupon notified the defendants of this fact, and demanded that they move the building back onto the lot. Defendants refused to do so, and plaintiff moved the building at a cost of \$1,267.50. This action was brought to recover that sum, and other damages. The judgment was entered for the reasonable cost of removal.

Counsel for appellants seem to concede that a mistaken survey would involve the surveyor in liability for damages directly due to the mistake, such as the cost of a correct survey. But it is argued that the damages here claimed are special, and beyond the power of the surveyor to limit. It is no doubt true that the owner may have in mind the construction of a cheap building, and so inform the surveyor at the time the survey is ordered, and afterwards change his mind and construct a large stone, steel, or other expensive building. In such case the surveyor might not be liable for the damages to the expensive building upon a mistaken location caused by an erroneous survey, because the survey was not made in contemplation of such building. But it seems clear, where the survey is made with reference to a particular building or use to which the lot is put, the surveyor would be liable for the damages naturally flowing from his error, because the parties had that use in contemplation. *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100; *Commissioner of Highways v. Beebe*, 55 Mich. 137, 20 N. W. 826. The building erected in this case was not an expensive

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building of its kind. While the character of the building was not discussed, it was stated to be an apartment house, and the building constructed appears to have been the ordinary kind of such houses.

It is also argued that the trial court erred in striking a portion of the answer, to the effect that it was the custom to guarantee the accuracy of surveys by certificate for which a larger fee was charged than in cases where the boundaries are ascertained without reference to the improvement of the lot, and that the survey made in this case was of the latter kind, and the smaller fee was charged; and, also, that the court erred in excluding evidence to the same effect. We think the court properly excluded such evidence. It was conceded upon the trial that the defendants were employed to make an accurate survey, whether they gave a certificate or not or received a large or small fee. Whether they gave a certificate or not, or whether they received a large or small fee, would not change the liability so as to relieve them from negligence. The contract of employment was definite and certain, to the effect that they would make an accurate survey; and it was known that the survey was for the purpose of erecting an apartment house upon the lot. The custom of giving a certificate for which a higher price was charged would be wholly immaterial in such case. Such certificate might operate as an assurance of accuracy, and render the surveyor liable on account of a mistake or error to respond in damages for any building however expensive, whether erected with or without knowledge of its character. But where it is shown that the surveyor knows the character of the building for which the survey is made, the custom alleged would not relieve him from liability.

It is argued that the evidence shows that the defendants used due care. It is admitted that a wrong survey was made. It was shown that the defendants, or the agent who actually did the work on the ground, overlooked the parking strip or misread the figures upon the chain, and that in this

way the mistake occurred. This was clearly not due care. The judgment is affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9911. Department One. December 16, 1911.]

PATRICK BARKER, *Appellant*, v. R. SARTORI *et al.*,
Respondents.¹

BILLS AND NOTES—BONA FIDE HOLDERS—DEFENSES—WANT OF CONSIDERATION. Negotiable promissory notes executed by the maker cannot be held void for want or illegality of consideration, when in the hands of holders for value, before maturity, without notice of any defect.

BILLS AND NOTES—NEGOTIABILITY—STATUTES—CONSTRUCTION. A note is negotiable, although due in installments without showing upon its face the amount due at maturity, under Rem. & Bal. Code, § 3392, defining a negotiable instrument to be one that contains an unconditional promise to pay a sum certain in money, and § 3393, providing that the sum is certain although it is to be paid with interest, by stated installments, with provision that all shall become due on any default, and for costs of collection or attorney's fees if not paid on maturity.

BILLS AND NOTES—NEGOTIABILITY—PROVISIONS OF MORTGAGE. The provisions of a mortgage securing a negotiable promissory note are not imported into the note so as to affect its negotiability.

BILLS AND NOTES—TRANSFER—BONA FIDE PURCHASERS—NOTICE OF DEFECT. The purchasers of notes secured by mortgages are not put upon inquiry as to want of consideration from the fact that the property was not worth the face of the note, or that a note was indorsed by a trustee of the payee, where it appears that they either looked at the property and were satisfied that it was good, or knew the payee and the trustee who had authority to make the indorsement, and relied on the indorsement, their only duty being to inquire into the regularity of the indorsement.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 29, 1911, upon findings in favor of the defendants, in a proceeding to determine the

¹Reported in 119 Pac. 611.

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application of condemnation awards, after a trial before the court without a jury. Affirmed.

Howard O. Durk and A. R. Rutherford, for appellant.

Bausman & Kelleher, for respondent Seattle National Bank.

MOUNT, J.—In the year 1910, the city of Seattle began proceedings to condemn certain lots for park purposes. Among these were lots 6 and 7, block 1, Columbia Terrace addition, and lots 7, block 24, of Squire's Lakeside addition. These lots were owned by Patrick Barker, who was made a party to the condemnation proceeding. Upon a trial of the condemnation case, Mr. Barker was awarded \$2,200 for the lots in Columbia Terrace addition, and \$1,013 for the lots in Squire's Lakeside addition.

After these awards were made and the money paid into court, R. Sartori, who claimed to hold a mortgage lien on lot 7, block 4, above stated, for \$1,000 and interest, and the Seattle National Bank, which claimed to hold a mortgage on the other two lots for \$2,200 and interest, were brought into the case upon petition of the city. These parties thereupon set up their mortgages, claiming to be purchasers of the notes secured thereby, before maturity, for value, and in good faith, and petitioned the court for the application of the funds to the payment of their respective mortgage liens. Patrick Barker answered these petitions, denying execution of the instruments and alleging affirmatively that both were void for want of consideration. Upon issues thus made, the trial court was of the opinion that Barker executed the notes and mortgages which were liens upon the premises covered by the respective mortgages, and that the petitioners were holders in good faith before maturity, and therefore entered orders directing the application of the funds remaining, after certain prior liens were paid, to the satisfaction of the petitioners' claims. Mr. Barker has ap-

pealed from these orders. Both cases depend upon the same state of facts, and were tried as one.

Appellant argues that the notes and mortgages given for their security are void, because they were executed without consideration passing to Mr. Barker. It may be true that no consideration passed, but the court found, and the evidence is clearly sufficient to show, that Mr. Barker executed the notes and mortgages. It is not disputed that Mr. Sartori and the Seattle National Bank acquired the paper for value before maturity, without notice of any defect or want of consideration between the makers and the original payee. It is clear, therefore, that these respondents are holders in due course, provided the paper is negotiable. *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. 1042. In that case the court quoted the rule in such cases from *Vallett v. Parker*, 6 Wend. 615, as follows:

"Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of, the consideration."

This is decisive of that question.

It is next argued that the paper was not negotiable. The notes contain similar provisions. One of them recites:

"Two years after date, without grace, for value received, I promise to pay to the order of H. P. Wolcott the sum of \$1,000, with interest at the rate of nine per cent per annum from date until paid. Interest to be paid semi-annually, and if not so paid to bear interest after delinquency until paid at the rate of nine per cent per annum."

The notes were secured by mortgages which contain stipulations requiring the maker to pay, in addition to the principal debt and interest, such sums as the mortgagee may be required to incur for insurance, taxes, assessments, and charges on the land, etc. It is argued, (1) that the provision in the notes renders them uncertain as to the amount

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to be paid at maturity, because, if the interest is not paid at certain fixed periods, such past-due interest bears interest; and (2) that the mortgages bearing the same date as the notes are assumed to have been made at the same time as the notes, and the two instruments must be construed as one contract, and therefore are entirely uncertain as to the amounts to be paid at maturity. Our statute, at § 3392, Rem. & Bal. Code, defines a negotiable instrument, and declares that it "must contain an unconditional promise or order to pay a sum certain in money." The next section provides:

"§ 3393. The sum payable is a sum certain within the meaning of this act, although it is to be paid—(1) with interest; or (2) by stated installments; or (3) by stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or . . . (5) with costs of collection or an attorney's fee, in case payment shall not be made at maturity."

It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing signed by the maker, and contain an unconditional promise to pay a sum certain in money. The fact that the interest was payable in installments does not render the notes uncertain, for the statute expressly provides that payments may be made by installments. This applies as well to interest as to the principal. The argument made by counsel, that an installment may not be paid when due and therefore the instrument would not show upon its face what amount would be due at maturity, would apply equally to the principal where payable by installments. There are cases which hold that notes like these are uncertain and therefore not negotiable, as for example, *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. 598, and *Davis v. Brady*, 17 S. D. 511, 97 N. W. 719; but those were cases which were based upon statutory provisions unlike ours.

• We are satisfied that the provisions of the mortgages were not imported into the notes so as to render them non-

negotiable. The rule is well stated in *Thorp v. Minedman*, 123 Wis. 149, 101 N. W. 417, 107 Am. St. 1003, 68 L. R. A. 146, as follows:

"The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms; such as the payment of taxes, the insurance of houses, and the like. While the two instruments will be construed together whenever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may disregard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note,

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containing all manner of agreements relating simply to the preservation of the security, will cut no figure."

See, also, *Farmers' Nat. Bank of Tecumseh v. McCall*, 25 Okl. 600, 106 Pac. 866; *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 116 Pac. 837.

It is next argued that the circumstances under which the respondents acquired the paper were sufficient to put them upon notice of the invalidity of the notes; (1) because the property mortgaged was not worth the face of the notes at the time the mortgages were given, and (2) that the notes were not indorsed by the payee, but were indorsed: "H. P. Walcott, H. W. Fisher, Trustee." The evidence shows that Mr. Sartori looked at the location of the lot covered by his mortgage at the time he purchased the note, and was satisfied that the property was good for the amount of the note at that time. There is no evidence that the bank made any examination of the property, but the officers of the bank knew the payee and her trustee and relied upon the indorsement. The evidence also shows that H. W. Fisher was a trustee for the payee, and was authorized to make the indorsements as they were made. The only duty which devolved upon the purchasers was to inquire into the regularity of the indorsement, for this was the only thing upon the face of the notes which did not appear to be regular. The notes in all other respects were regular, and the purchasers were authorized to rely upon the face of the papers unless they had notice of some irregularity. There is nothing in the evidence to show any such notice.

The judgment must therefore be affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

[No. 9833. Department Two. December 16, 1911.]

VICTORIA A. WOOD, *Appellant*, v. THE CITY OF TACOMA,
Respondent.¹

WATERS—DIVERSION—SURFACE WATERS—DAMAGES. There is no liability for increasing the flow of surface water upon the land of another, where it is not cast upon the land in a concentrated and destructive body.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES TO PROPERTY—ORIGINAL GRADES—SURFACE WATERS—DIVERSION. A city not being liable to property owners for damages from the original grading of streets, under Rem. & Bal. Code, § 7815, and surface water being an outlaw and common enemy against which any one may defend himself, a city is not liable for damages from the impounding upon lots of surface waters through the construction of fills in streets and alleys in making initial grades.

SAME. Surface waters discharged through a manhole in a sewer upon lots in a diffused form as it would have flowed in any event do not render the city liable for damages.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGE TO PROPERTY—NEGLIGENCE—LIABILITY—SURFACE WATERS. A city is not liable for temporary damages occasioned by negligence in making initial grades in streets and alleys, whereby surface water was impounded upon plaintiff's lots, where the plaintiff had reasonable notice of the city's intention to make the fills impounding the water and opportunity to defend her property by draining off the water or filling the property.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 18, 1910, in favor of the defendant, dismissing an action in tort, on granting a nonsuit. Affirmed.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats,
for appellant.

T. L. Stiles, F. R. Baker, and F. M. Carnahan, for respondent.

¹Reported in 119 Pac. 859.

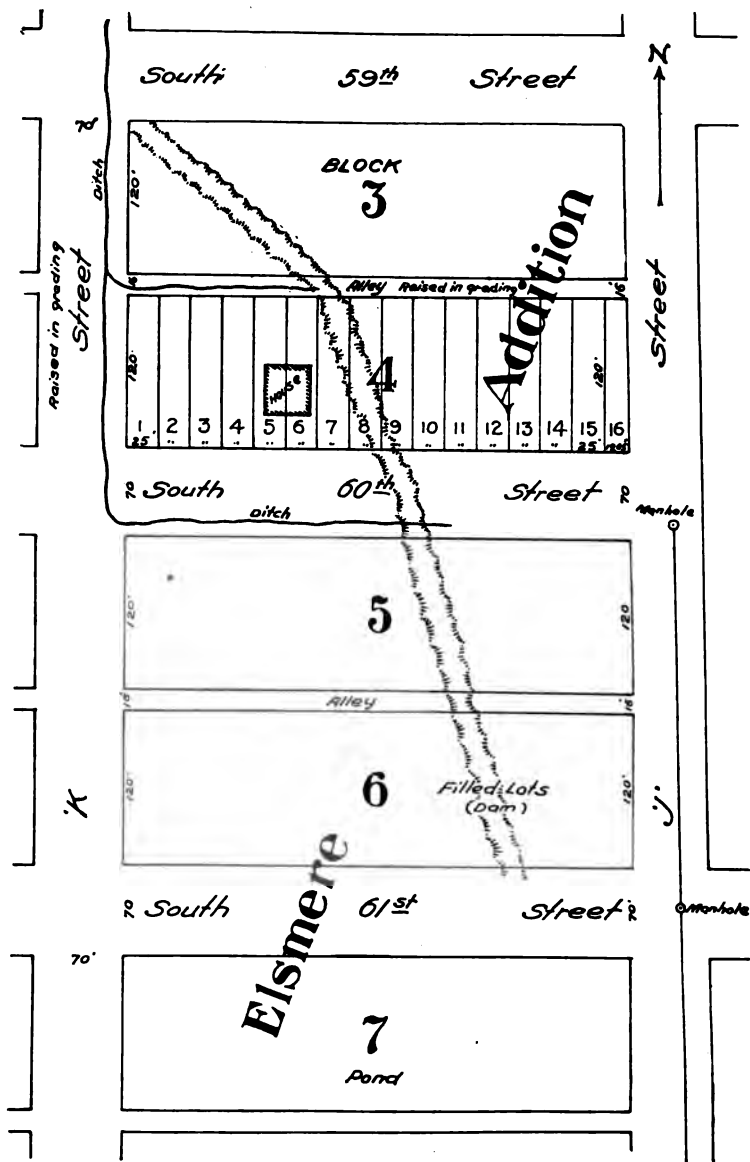
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ELLIS, J.—This is an appeal from a judgment of nonsuit and dismissal of an action to recover damages consequent upon the grading of, and construction of storm sewers in, certain streets in the city of Tacoma.

About three years before any of the streets in the vicinity of her property had been graded, the appellant bought lots 5 to 10, inclusive, in block 4, of Elsmere addition to Tacoma. Block 4 fronts to the south on 60th street, and is bounded on the east by J street, on the west by K street, and on the north by the alley between blocks 3 and 4. We reproduce a plat from respondent's brief the correctness of which seems not to be questioned, merely for the purpose of illustration and to show the location of streets in relation to the appellant's lots. See next page.

Elsmere addition is in an outlying part of the city. Some houses had been built there and in that neighborhood, apparently before any of the streets were graded or any drainage provided. The general slope of the land in that vicinity is from the south and east to the north and west. Appellant's lots occupy low ground, across which originally the natural drainage of the country to the south and east for a considerable distance flowed. Originally this surface water ran off of appellant's lots and across block 3 to the northwest. At the time when the city began the grading here in question, improvements and filling by the owners of block 3 had obstructed the natural course of the water, so that it ran in a small ditch—it does not appear by whom dug—along the alley to K street, and thence north. There was also a ditch on the southerly side of 60th street which carried a part of the surface water to K street. This was apparently dug after the appellant had purchased and built on her lots; and, also, after that time, the city dug a ditch northward along K street to carry all this surface water to a large drain on 58th street. It appears that these ditches, and also other ditches and drains on this sloping territory, the location and character of which are not made clear by



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the evidence, had been made, some of them by the city, and others by the owners of different properties. It seems to be admitted that no permanent system of drainage had been constructed or adopted by the city in this territory when appellant purchased her lots and built her house, nor up to the time of the grading complained of in this action. Up to that time, the drainage, such as it was, was merely temporary in character and construction and adapted to the natural surface of the ground.

In the fall of 1909, the city, by contract, began the grading of the streets and alleys in the vicinity of appellant's property. The work apparently included all of these streets, excepting south 60th street. This grading was the initial improvement of these streets, the first change from the natural contour of the ground. Just before the heavy rains of November, the grading of K street had been completed; and between 60th and 59th streets, it had been necessary to raise the level of the street and sidewalks a little above the natural surface. At the same time, and as a part of the same work, the alley between blocks 3 and 4 was correspondingly raised. There was, therefore, a fill, variously estimated at from a foot to two feet, in the alley in the rear of appellant's lots. This grading of the street and alley filled the ditch in the alley and stopped up the K street end of the ditch on 60th street. At the same time, the city was constructing a storm sewer, from 64th street north along J street to 60th street, and along 60th to K street. The heavy rains stopped the work before it reached K street. It does not appear that this sewer was fully completed from 64th street down to 60th street, but it does appear that the pipes were laid at 60th and J street, and that there was a manhole at 61st street and another at 60th street.

In the grading of 61st street, there was a slight cut between K and J streets, and the surplus dirt was used in filling the lots in the vacant block 6, abutting on the north side of 61st street. This whole block was filled to about 18

inches above the street. When the heavy rains of November came, the water, following its usual course from the higher ground from the south and east, being arrested by this filling of block 6, collected in 61st street and vicinity forming a pond. A part of the filling on the lots near J street washed away, and some of the water which had collected in 61st street flowed into the unfinished storm sewer, and out again through the manhole at 60th and J street, thence down 60th street onto appellant's lots, and was there retained by the filled grade of K street and of the alley in the rear of her lots, causing the injury complained of.

It is fairly deducible from the whole of the evidence that little if any more water was thus collected upon appellant's lots than would have been the case had no water been allowed to collect in 61st street and had no storm sewer been constructed in J street. The water which came from 61st street would simply have collected in the first instance in 60th street and upon the appellant's lots. It was merely delayed in its progress by the filling in of block 6, and reached appellant's lots possibly a little later than otherwise by going around the block instead of crossing it diagonally. But even if there was an increase in the amount of water, it has been held not to create a liability unless the water be cast in a concentrated and destructive body upon the land. *Davis v. Crawfordsville*, 119 Ind. 1, 21 N. E. 449, 12 Am. St. 361; *Jordan v. Benwood*, 42 West Va. 312, 26 S. E. 266, 57 Am. St. 859, 36 L. R. A. 519; *Hume v. Des Moines*, 146 Iowa 624, 29 L. R. A. (N. S.) 126; *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61.

The real cause of the water collecting upon appellant's lots was the raising of the grade of K street and the alley back of these lots, which stopped the drains in 60th street and the alley, thus impounding the water. The evidence fairly indicates that, but for this grading, the water would have passed off as formerly. The appellant herself makes

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this plain. With reference to the old drains in the alley in 60th street and K street, she testified:

"Q. This is 60th street, as I understand you; what do you call this (referring to Identification A). There was a drain which you say the city made some time down there, and opened it down there in 60th street? A. Yes. Q. Was the ditch in K street at that time the same kind of a drain? A. No, it was a box. Q. Was it open on K, on this side? A. No they covered it up. Q. How far does it run? A. Run down as I understood down to 58th; they had a big ditch down 58th. Q. If it was not for putting that drain in there by somebody by Mr. Wright or somebody, all of this water would have come across your place? A. Yes. Q. So far as that is concerned, that relieved you some? A. Yes, after they graded the street last winter, they put the dirt in here (indicating on Exhibit). Q. That is what you complain of? A. Yes, I complain of them stopping the ditches and the natural drain. Q. Is it not a fact that the natural drain went down across the lots further? A. No, it went through the alley, not through Hadland's lots at all."

It is now established law in this state that damages cannot be recovered for consequential injuries to private property occasioned by the original grading of streets and alleys. The dedication of streets and alleys to the public use implies an agreement of the dedicator and his successors in interest that the city may establish grades and improve the streets and alleys thereto in aid of such use. *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; *Fletcher v. Seattle*, 48 Wash. 627, 86 Pac. 1046, 88 Pac. 843; *Laws* 1909, p. 151, § 1 (Rem. & Bal. Code, § 7815); 4 *Dillon, Municipal Corporations* (5th ed.), § 1684.

It is also the settled doctrine in this state that surface water caused by the falling of rain or the melting of snow, is to be regarded as an outlaw or common enemy against which every proprietor of land may defend himself, even if in consequence of such defense injury result to others. As to surface waters, this court has definitely adopted the rule

of the common law, as distinguished from the contrary rule of the civil law. *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. 859; *Harvey v. Northern Pac. R. Co.*, 68 Wash. 669, 116 Pac. 464; Gould, Waters (3d ed.), § 265; 30 Am. & Eng. Ency. Law (2d ed.), p. 330.

From the adoption by this court without qualification or restriction of these two doctrines, namely, that a municipal corporation is not liable for injuries consequent upon the initial grading and improvement of its streets, and that surface water is a common enemy against which any one may defend himself, arises the corollary that a city is not liable in damages for injuries to private property by the collection of surface water thereon, caused by the initial grading or improvement of its streets and alleys. Injuries resulting from the reasonable exercise of a legal power are consequential, and cannot be made the basis of recovery. Such is the rule in all those jurisdictions which have adopted without modification the common-enemy doctrine of the common law.

"In the jurisdictions which adopt the common law rule, it is held that the rule applies fully to municipal or quasi-municipal corporations as to individuals, and that such a corporation does not incur any liability if in the improvement of its streets or highways it prevents the flow of surface water from adjacent lots; and the same has been held true with regard to the improvement of city lots owned by a municipality. On the other hand, it has been held that a landowner may, by erections or obstructions on his own lands, prevent the flowage of surface waters from a highway upon his land." 30 Am. & Eng. Ency. Law (2d ed.), pp. 331-332.

See, also, 4 Dillon, Municipal Corporations (5th ed), §§ 1732, 1733; Elliott, Roads & Streets (3d ed.), § 556; Gould, Waters (3d ed.), § 269.

There is an exception to this rule of nonliability, which, though not indorsed by some of the courts, and which we do not find has often been applied to the initial grading of streets, we nevertheless believe to be sound in any case. A

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city may not gather up surface water and discharge it upon land in a concentrated volume to the injury of the land without liability, whether the water be such as naturally would have flowed onto the land or not. The reason is that when collected and discharged in considerable volume upon the land at a given point it may erode and wash channels in the land thus becoming very destructive and injurious. *Johnson v. White*, 26 R. I. 207, 58 Atl. 658, 65 L. R. A. 250, and note to p. 262. The appellant contends that the evidence brings this case within the exception. But we think not. It fails to show that the water was discharged upon the appellant's lots in a concentrated volume. It escaped from the manhole in the street, and flowed upon the appellant's land in a diffused form, as it would have done in any event. In such a case, the mere fact that the water was concentrated in its course to appellant's land does not create a liability which would not otherwise exist. *Clay v. St. Albans*, 43 West Va. 539, 27 S. E. 368, 64 Am. St. 883.

There remains to be considered the question of negligence. It must be conceded that a municipal corporation, like an individual, is liable for injuries resulting from the negligent exercise of legitimate powers. There is no evidence whatever that, on the completion of the storm sewer on J and 60th street and the new drain on K street, they did not furnish adequate drainage for this district, including appellant's property; nor was there any evidence that, if the improvement had been completed before the rainy season, any injury would have occurred. The evidence does not make a case of improper or negligent final construction, but merely shows a failure to provide adequate temporary drainage during the progress of the work and the delay made necessary by the rainy season. There is no negligence where there is no violation of duty. There was no absolute duty on the part of the city to furnish temporary drainage for appellant's lots pending the grading and placing of drains in K street and the construction of the storm sewer on J

and 60th streets; nor was it bound to do this if it would entail expense or cause any considerable interference with the prosecution of the work of grading the streets after it had been undertaken, or if it was incompatible with the plan of improvement adopted by the city. Nor was the city bound to do this at all, if the appellant had sufficient notice of the contemplated improvement of the streets, and the manner in which the work was to be done, to have enabled her to protect her lots by providing drainage herself, or by filling the lots, as the evidence shows she has since done. The fact that the old temporary ditches had been dug in the ungraded alley and in the ungraded 60th street, either by the city or with its permission, can make no difference. The city did not thereby abdicate its right to establish an initial grade for its streets and fill them to that grade even if in so doing it filled these ditches. Any other view would make the city liable to some one for some inconvenience every time it sought to grade a street for the first time, and thus render the statute nugatory. The rule in such a case which appeals to us as reasonable, and especially as in consonance with our statute which does not permit recovery for damages for injuries resulting from the reasonable exercise of the power to grade streets for the first time (Rem. & Bal. Code, § 7815) is declared by the supreme court of Iowa, in a case cited by appellant, as follows:

"The true rule here, as we understand it, is that, as the city had power to grade and gutter its streets, it is not liable for defective plans, for in adopting them it acts in a judicial capacity. But it is liable if it negligently carries out such plans, or if, without the adoption of any plans, it proceeds in a negligent manner to make embankments or fills, to the injury of an abutting or adjoining proprietor. As applied to the facts of the case, the city was not liable because of its establishment of grades for West Walnut and West Sixteenth streets, because its act in so doing was either legislative or judicial in character; but in bringing the streets to these grades established, it was bound to the exercise of ordinary care and prudence, and if it unneces-

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sarily or negligently filled ditches and drains in West Sixteenth street, and thus cast surface water back upon plaintiff's lots, without notice to her, and without her knowledge, and without giving her a reasonable time to bring her lots to grade, the city is liable, not because of defective plans, but by reason of negligence in doing a purely ministerial act; that is, of bringing the streets to the established grade, and, in so doing, filling the ditches and drains for the escape of surface water without providing an escape, either temporary or permanent, for the surface water. Moreover, there was evidence tending to show that it so filled the streets as to collect surface water and discharge it upon plaintiff's lot. As plaintiff had the right to fill her lot by bringing it to the established grade, doubtless defendant was not obliged to provide permanent culverts, drains, or bridges, although that point we do not now decide. If, after her property is brought to grade, such culverts, ditches, or drains should be constructed, a question may then arise as to defendant's duty in the premises." *Hume v. Des Moines*, *supra*, 29 L. R. A. (N. S.) 127-136.

The evidence shows that the appellant had notice of the city's intention before the old ditches were filled. She says she protested to the city officials, and in fact that she brought suit against the city in an attempt to stop the grading of K street. She made no attempt to protect her lots, either by filling, diking, or by opening the old drains, which the city would doubtless have permitted after the drain in K street was completed. This was before the rains set in. The evidence sufficiently shows that this would have been permitted, since the city, in about two days after the first accumulation of water, as appellant admits, "drained it out the best they could," by digging a ditch in the alley; and in the spring she says, "They drained it all out and finally put in a box." The testimony of both the appellant and her husband shows that, neither before the fall rains nor after, did they themselves do anything whatever, either to protect the property from water or to drain it off after it accumulated. Surface water being a common enemy, they had the same right to protect their property from it as the

city had to protect its streets. 4 Dillon, Municipal Corporations (5th ed.), § 1733.

"It is clear that there is no liability on the part of a municipal corporation for not exercising the discretionary or legislative powers it may possess to improve streets, and, as part of such improvement, to construct gutters or provide other means of draining for surface-waters, so as to prevent them from flowing upon the adjoining lots. And even when the work of grading the streets has been entered upon, there is not ordinarily, if ever, any liability to the adjoining owner arising merely from the non-action of the corporation in not providing means for keeping surface-waters from property situate below the established grade of the street. There are, indeed, cases which go further, and assert that there is no such liability where, in making improvements upon streets or elsewhere, authorized by law, surface-waters are purposely turned from one's own land to that of another,—from the street directly upon the adjacent property owner." 4 Dillon, Municipal Corporations (5th ed.), § 1734.

It would be worse than useless to attempt to harmonize the wilderness of decisions from other states on the questions here involved. Some of them follow the common law rule, others the opposite rule of the civil law, and still others a modified form of the one or the other. So far as we are able to discover by a careful reading of the authorities cited by the appellant, they nearly all arose upon a change of an established grade and not upon an initial grading of the street. In none of them was there a statute involved such as we have here. Manifestly they would not apply under the provisions of our statute which expressly limits recovery to injury by changes of grade. Moreover, they differ widely in their facts from the case before us. In view of the statute as construed in *Ettor v. Tacoma*, *supra*, and the rule as to surface water as announced in *Cass v. Dicks*, *supra*, we are compelled to hold that the evidence here fails to make a *prima facie* case against the city. The judgment is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 9577. Department Two. December 16, 1911.]

*In re WESTLAKE AVENUE, SEATTLE.*¹

NAVIGABLE WATERS—BRIDGES—RIGHT TO ERECT—FEDERAL CONSENT—POLICY. The secretary of war having consented to the erection of a temporary bridge across the Lake Washington canal, the same to be "removed or rebuilt when the work of constructing the canal may render such action necessary," the city has power to build a permanent bridge at that point upon complying with required conditions, under 30 Stats. at L. 1151, providing that structures may be built under authority of the legislature of the state across waterways wholly within the limits of the state when the location and plans therefor have been approved by the chief of engineers and secretary of war, and Rem. & Bal. Code, §§ 7868, 7869 in harmony therewith, in view of the settled policy of the Federal government to allow local authorities to select the location for such bridges, subject to the approval which was given; it not being contemplated that the Federal government might subsequently arbitrarily refuse to approve the location of a proper bridge at that place.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—BENEFITS—CONTEMPLATED IMPROVEMENTS—BRIDGES. Upon the improvement of a street crossing a navigable waterway in contemplation of the erection of a bridge, raising the grade to make proper approaches for the bridge which would be useless for any other purpose, property abutting on the streets may be assessed for the benefits that will accrue by subsequently constructing the bridge, although not yet provided for, where the bridge is an essential part of the improvement and will materially benefit the property, and the evidence shows that the bridge will be erected at that place.

SAME—ASSESSMENTS—PROPERTY SUBJECT—EASEMENTS—RAILROAD FRANCHISE. Where a railroad company has a mere easement or right of way to maintain tracks in a street, it cannot be assessed for benefits from the improvement of the street, required to be assessed against abutting property benefited thereby; especially where its franchise compelled it to make a substantial cash contribution towards the expense of the improvement.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 11, 1911, confirming an assessment roll for the improvement of streets, after a trial before the court without a jury. Affirmed.

¹Reported in 119 Pac. 798.

Carkeek & McDonald and *Victor M. Place*, for appellants, contended, among other things, that the commissioners could not consider benefits from the construction of a bridge which was not included within the improvement. *Hutt v. Chicago*, 132 Ill. 352, 23 N. E. 1010; *Chicago v. Kemp*, 240 Ill. 56, 88 N. E. 284; *Kansas City v. St. Louis & S. F. R. Co.*, 230 Mo. 369, 130 S. W. 273, 28 L. R. A. (N. S.) 669.

Scott Calhoun and *William B. Allison*, for respondent.

Crow, J.—This is an appeal from an order confirming an assessment levied for the improvement of Fremont and Westlake avenues, in the city of Seattle. Westlake avenue is one of the principal thoroughfares of Seattle, and extends for a considerable distance in a northerly direction immediately west of Lake Union, with its northern terminus at the U. S. government ship canal. Fremont avenue, another thoroughfare and practically a continuation of Westlake, extends from the north side of the canal in a northerly direction. The improvement involved the grading of Fremont and Westlake avenues, and also the widening of a portion of the latter. The city, by Ordinance No. 22,817, enacted December 27, 1909, granted to the Northern Pacific Railway Company a perpetual right of way, thirty feet in width, over the easterly side of Westlake avenue. On October 29, 1902, the acting secretary of war approved a map of location and plans for a bridge across the canal connecting Fremont and Westlake avenues, and delivered to the city the following written permit:

“Whereas, By section 9 of an act of Congress approved March 3, 1899, entitled ‘An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,’ it is provided that bridges, dams, dikes, or causeways may be built under authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by

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the chief of engineers and by the secretary of war before construction is commenced;

"And whereas, The board of public works of the city of Seattle, Washington, having authority of the legislature of the state of Washington to construct a bridge across the Lake Washington ship canal right of way at Fremont in said state, has submitted a map of the location and plans of the same, which have been approved by the chief of engineers;

"Now, therefore, this is to certify that the map of location and plans of said bridge, which are hereto attached, are hereby approved by the secretary of war, subject to the following conditions:

"(1) That the engineer officer of the United States army, in charge of the district within which the bridge is to be built, may supervise its construction, in order that said plans shall be complied with.

"(2) That said bridge shall give a clear opening in the direction of the axis of the canal not less than seventeen and one-half ($17\frac{1}{2}$) feet wide.

"(3) That said bridge shall be removed or rebuilt whenever the work of constructing the canal may render such action necessary."

Attached to this permit is a map designated: "Plan showing location of proposed bridge across an arm of Lake Union near Fremont, Seattle, Washington, accompanying application of the city of Seattle under date of April 1st, 1902." The bridge was built and continued in use for several years. On September 17, 1906, notice to remove it and other bridges in aid of the construction of the canal, together with suggestions to be considered by the city of Seattle in adopting plans for rebuilding, was transmitted to the chairman of the board of public works, by H. M. Chittenden, major of the corps of engineers of the United States army, by letter of that date, in which he in part said:

"The provisional authority granted by the secretary of war on April 29, 1902, for construction of a crossing at Fremont avenue contains the following: 'That said bridge shall be removed or rebuilt whenever the work of constructing the canal may render such action necessary.' . . . The

time has now arrived when it is necessary for the government to take advantage of its rights under the deed of right of way, and the conditions in permits granted since the date of condemnation proceedings, and to require the removal of the bridges above referred to. Application for permission to erect new structures, if accompanied by the necessary maps and plans, will be entertained, and to assist in the preparation of such plans the following conditions approved by the chief of engineers U. S. army, are specified, which it will be necessary for the structures to conform to: . . ."

Then follows a detailed statement of required conditions. Thereafter Ordinance No. 17,629 of the city was approved, which provided for the laying off, extending, and establishing Westlake avenue, from the south line of Mercer street to the south line of the Lake Washington canal, and of Fremont avenue from the north line of the Lake Washington canal to Ewing street, for changing and establishing the grades thereof, for condemning, taking and damaging necessary property, for grading approaches, and for an assessment on property benefited. Ordinance No. 22,458,

"Providing for the improvement of Westlake avenue from Mercer street to Fremont avenue, and of Fremont avenue from the intersection of Westlake avenue north, Nickerson street, and Fourth avenue north (at the canal) northward across the government canal . . . by grading and filling said avenues to the elevation established by Ordinance No. 17,629 . . ."

was approved on March 1, 1910. This ordinance, with much detail, directed the improvement, created a local improvement district, provided that the cost and expense should be defrayed by assessments on property within the district, and also provided:

"That the plans and specifications of the bridge or roadway upon that portion of the avenue crossing the government canal shall be of such plan and design and of such width and of such character as the United States engineers may require and permit; . . . that the Northern Pacific Railway Company shall pay into the city treasury to the

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credit of the local improvement district herein created the sum of thirty thousand dollars (\$30,000) in accordance with the terms and provisions of Ordinance No. 22,817; and provided further, that the Northern Pacific Railway Company shall also pay into the city treasury to the credit of the local improvement district herein created, a sum of money equal to one-fifth (1-5) of the total cost of said improvement in accordance with the provisions of Ordinance No. 22,819"

The Ordinance mentioned, No. 22,817, was passed December 27, 1909, and granted to the Northern Pacific Railway Company the franchise above mentioned, subject to an acceptance of its conditions within ninety days by the railway company. It was duly accepted on February 25, 1910, by resolution of the board of trustees of the railway company, duly adopted, and thereafter certified to and filed with the city of Seattle on March 5, 1910.

The special assessment of which complaint is made by numerous property owners within the district, the appellants herein, was thereafter levied. By the roll, much heavier assessments were cast upon property in the immediate neighborhood of Fremont and Westlake avenues near the canal than elsewhere in the district. In making these heavier assessments, the commissioners considered benefits which would accrue to property in that locality by reason of the contemplated erection of a bridge over the canal on the line of these avenues, which would become a portion of an important thoroughfare between the northerly and southerly portions of the city. The evidence shows the existence of Stone avenue, another thoroughfare several blocks east of Fremont avenue, which also runs in a northerly direction from a westerly arm of Lake Union. On October 6, 1910, the acting secretary of war issued a permit to the city for the construction of a temporary bridge across the canal at Stone avenue. Attached to this permit is a plat entitled, "Location of proposed trestle bridge across Lake Union from Westlake avenue to Stone Way." It is manifest that the bridge here contem-

plated at Stone avenue or Stone Way, is to be for temporary use only. Appellants, however, contend a permanent bridge is contemplated; and on the trial insisted the commissioners should have considered the probability of its construction and benefits in casting the assessment. Without discussion, we suggest our conclusion that all evidence relative to any contemplated bridge, either temporary or permanent, at Stone avenue, was immaterial, and that the only question relative to any bridge, to be considered on this hearing, is the probability of a bridge on the line of Westlake and Fremont avenues, a necessary and essential part of the improvement under consideration.

Appellants contend that the assessment is inequitable, unjust, and not cast in accordance with benefits bestowed, as the commissioners considered supposed benefits that may inure by reason of a contemplated bridge at Fremont and Westlake avenues; that there has been no proof that the Federal government by any special act of Congress has authorized, or that it will authorize, the construction of a bridge at that point; that the city is without power in the absence of such authority, and that no bridge may ever be constructed. In support of this contention, they argue that the original Ordinance No. 17,692 fails to mention any proposed bridge; that without any bridge, property in the immediate vicinity of Fremont avenue will be damaged and not benefited; that the city has not officially provided for any bridge at Fremont avenue; that it has provided for one at Stone avenue which appellants contend is the logical place for a permanent bridge, and that the imaginary benefits considered by the commissioners as resulting from a bridge at Fremont avenue do not exist and cannot be the basis of an assessment. The questions to be considered are whether the city has any right to locate and erect the bridge, whether its erection is contemplated and probable, and whether the benefits it will confer were properly considered by the commissioners in casting the assessment.

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The Lake Washington ship canal is a navigable waterway lying entirely within the limits of the state of Washington and the city of Seattle. In *Escanaba Co. v. Chicago*, 107 U. S. 678, 687, the supreme court of the United States said:

"Bridges over navigable streams, which are entirely within the limits of a state, are of the latter class [local]. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a government at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the states, Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."

For many years Congress has, by its enactments, reserved to the United States government the right to direct changes in, or the removal of, bridges and other structures erected over navigable waters lying wholly within a state, and has conferred upon the secretary of war the power to enforce such control. The policy of the government has been not to determine upon the locality of such bridges, but to reserve to itself the right to approve locations selected and plans proposed by the state authorities, so that navigation and commerce shall not be unnecessarily hindered, impaired, or destroyed. In *Lake Shore & M. R. v. Ohio*, 165 U. S. 365, the court, in discussing the act of Congress of September 19, 1890, chapter 907, said:

"The contention is that the statute in question manifests the purpose of Congress to deprive the several states of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the states as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined. . . . The mere delegation to the secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce,

and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the secretary power to that end. . . . The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built."

Appellants cite § 9 of the subsequent act of March 3, 1899, 30 Stats. at L., 1151, 6 Fed. Stats. Ann. 805, which reads as follows:

"That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the chief of engineers and by the secretary of war: Provided, That such structures may be built under authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the chief of engineers and by the secretary of war before construction is commenced; . . ."

This section was enacted after the dates of the decisions above cited, and the proviso it contains recognizes the right of the legislature of any state to authorize the construction of bridges across navigable waters which lie wholly within the limits of the state, more clearly and distinctly than it was recognized in the act of September 19, 1890, *supra*. In 1902, in *Cummings v. Chicago*, 188 U. S. 410, the supreme court of the United States, speaking through Mr. Justice Harlan, after quoting from *Lake Shore & M. R. v. Ohio*, *supra*, the identical excerpt which we have above quoted, in speaking of the later act of March 3, 1899, said:

"Whether Congress may, against or without the expressed will of a state, give affirmative authority to private parties

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to erect structures in such waters, it is not necessary to this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the states."

In the recent case of *Hubbard v. Fort*, 188 Fed. 987, the United States circuit court for New Jersey, after commenting on the later act of March 3, 1899, said:

"Among the changes affected by the act of 1899 was to require the affirmative authorization by Congress to create any obstruction to the navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state was permitted if authorized by state legislation and the location and plans of such structure were approved by the chief of engineers and of the secretary of war."

As to the policy of the United States government on this question see the following additional cases: *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Withers v. Buckley*, 20 How. 84; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Montgomery v. Portland*, 190 U. S. 89; 27 Opinions of Attys. Gen. (U. S.) 284.

Appellants cite the act of Congress of March 23, 1906, ch. 1130, 34 Stats. at L., 84, and contend that, by reason thereof, it will be necessary to obtain permission from the national government by special act of Congress before any bridge can be constructed by the city at Fremont and Westlake avenues. The statute cited has no application to the construction of bridges across navigable waters which lie wholly within the limits of a single state. Authority for building the bridge now under consideration is found in the act of March 3, 1899, *supra*. The method of procedure which has been adopted by, and has obtained in, the war department of the United States under these several acts of Congress is disclosed by the various reports of the chief of

engineers of the United States army. For instance, in part 1 of his annual report for 1910, at page 1019, under the subject of "Bridging Navigable waters of the United States," he says:

"Plans and maps of locations of the following bridges proposed to be erected under the authority of special acts of Congress have been examined with a view to protection of the interest of navigation and have been approved by the secretary of war, as provided by the acts, and the local engineer officers have been furnished copies of the instruments of approval and drawings showing the plans and locations and charged with the supervision of the construction of the bridges, so far as necessary to see that they are built in accordance with the approved plans."

Following this statement appears a list of some thirty-four bridges about to be constructed under special acts of Congress. At page 1023 he further says:

"Under the provisions of section 9 of the river and harbor act approved March 3, 1899, bridges may be built over navigable waters entirely within the limits of any state, under authority of legislative enactments of such state, when the plans and locations of the structures are approved by the secretary of war. Plans and maps of locations of the following bridges proposed to be erected under these provisions have been examined with a view to protection of the interests of navigation and have been approved by the secretary of war, and the local engineer officers have been furnished copies of the drawings and instruments of approval and charged with the supervision of construction of the bridges, so far as necessary, to see that they are built in accordance with the approved plans."

Then follows a list of more than one hundred bridges about to be erected under state authority, without any special acts of Congress, some of them being within the limits of this state. The locations and plans of all these bridges were selected and adopted under state authority, and were afterwards approved as reported by the chief of engineers of the United States army acting for and on behalf of the secretary of war. In further illustration of the national policy, ref-

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erence may be made to Public Document No. 953 of the House of Representatives of the 1st session of the 60th Congress, a letter transmitted to the speaker on May 20, 1908, by the acting secretary of war, which includes a report of Major H. M. Chittenden relative to the canal. At page 12, Major Chittenden, under the subject "Structures over the Canal," said:

"The question of bridges over the canal, as well as that of proper structures for carrying wires, water pipes, sewers, etc., under the canal has been carefully considered and the local public has been given to understand what will be required in these respects. Under date of May 11, 1907, the secretary of war ordered the removal of existing bridges over the canal within a specified time. Applications for permission to erect new structures were authorized and when these applications are presented they will be allowed under the following conditions:

"Bridges must be draw or lift bridges of permanent character—steel or masonry. The clear width of opening must be at least 150 feet, measured perpendicular to the line of the channel. Foundations must be carried well below the limit of probable dredging. The clearance under all bridges, except those at the head of Salmon Bay, must be 30 feet above high water. At the head of Salmon Bay 20 feet will be admitted, on account of the difficulty of providing approaches with a greater height. Bridges must be equipped with efficient machinery for operating them quickly. Telegraph or other wires carried overhead must clear the channel by 200 feet. Sewers, water pipes, conduits for wires, etc., carried under the channel must be at least 36 feet below mean low water."

Compliance with these conditions will enable the city to reconstruct the bridge. From authorities cited, and the history of Congressional legislation, it is manifest that the national policy as to navigable waters lying wholly within a state has at all times been that the state, or its authorized representatives, shall, in the first instance, select locations and adopt plans for bridges, but that prior to actual construction, and for the protection of navigation, such loca-

tions and plans shall be approved by the secretary of war. In pursuance of the act of March 3, 1899, and in harmony therewith, the legislature of this state enacted chapter 157, Laws of 1909 (Rem. & Bal. Code, §§ 7868 and 7869). A prior statute relative to bridges, Laws 1890, p. 54 (Rem. & Bal. Code, §§ 7862-7867), also provided for the protection of navigation. The records in this cause show that the original bridge over the canal at Fremont avenue was constructed at a point selected by, and in accordance with, plans adopted by the city of Seattle and afterwards approved by the secretary of war, with the understanding, as shown by the permit of the secretary of war, "that said bridge shall be removed or rebuilt when the work of constructing the canal may render such action necessary." This condition did not contemplate that the secretary of war might thereafter arbitrarily order the bridge removed and prohibit the erection of another in its place, but did contemplate that the city, at its election, might rebuild at the same point, provided it adopted plans for rebuilding, which the secretary of war would approve. H. M. Chittenden, major of the corps of engineers of the United States army, in recognition of this right, not only advised the city board of public works of the necessity of removing the old bridge in aid of the canal development, but also advised them of particular specifications which the chief of engineers of the United States army, acting for the secretary of war, would require in plans for a new bridge to be thereafter constructed at the same point, his manifest intention being to aid the city in its adoption of plans for a new bridge, and thereby facilitate its labors.

It is not to be presumed that the chief of engineers or the secretary of war will arbitrarily refuse to approve any plans whatever. The only duty imposed upon them is to see that no unnecessary interference with navigation is caused by the new bridge when erected. Property rights and business interests of the city of Seattle are to be protected and con-

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served as well as the interests of navigation. Large portions of the city lie on either side of the canal. It is absolutely necessary that means be provided for the public to cross and recross. There must be at least one bridge, and possibly several, across the canal. The record satisfies us that a bridge will be erected at Fremont avenue, that it will comply in every respect with Federal and state requirements, and that it will be approved by the chief of engineers and secretary of war. The grades of Fremont and Westlake avenues are to be raised to an extent sufficient to afford proper approaches for such a bridge. The grades thus adopted and constructed would be useless for any other purpose. There can be no question but that a bridge must be constructed as an essential part of the improvement, that it will materially benefit adjacent and abutting property, and that such resulting benefits were properly considered by the commissioners in casting the assessment.

In *Dickson v. Racine*, 65 Wis. 306, 27 N. W. 58, the court, speaking of benefits to be conferred by a bridge constructed across a stream on the line of a street improvement, said:

"We are, however, of the opinion that in assessing benefits the commissioners and jury would be justified in taking into consideration the benefits which would accrue to the lots from the expectation that a bridge would be constructed across the river, at the end of the street, within a reasonable time. The reason for opening the street was to make an approach to a bridge, the construction of which was contemplated by the city in the near future. It would seem absurd to say that such fact should have no effect in estimating benefits. The opening of this street in question rendered it practicable for the city to construct a bridge at the end of it, across the river, and without this street no such bridge could have been constructed which would have been of any public use. The opening of the street rendered it practicable to build a bridge at that place across the river, which would be a great public convenience; and, it appearing also that it was almost a public necessity to have a bridge at

that place, it would seem reasonable that such fact would tend to enhance the value of the property in the vicinity of such new street, and it was for the jury to determine whether that fact did or would enhance the value of the plaintiff's lots. This view of the case was entertained by the supreme court of Ohio in the case of *Chamberlain v. Cleveland*, 34 Ohio St. 551-568."

In preparing the roll the commissioners did not assess the right of way of the Northern Pacific Railway Company, which appellants now argue was benefited and should have been assessed. They insist the trial court erred in not requiring the commissioners to prepare a new roll and assess it. The right of way is entirely within the limits of Westlake avenue. If it should be abandoned by the railway company, the property on which it is located would continue a public street, and would not be subject to assessment. Appellants, in support of their contention, cite *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 123 Am. St. 955, 12 L. R. A. (N. S.) 121. There the assessment was upon private property abutting the street, and the assessment was sustained because the real estate was benefited and could not be relieved from liability to assessment by reason of its having been devoted to a use not benefited by the improvement. The theory upon which that case was decided is disclosed by the following language used in the opinion:

"Although the appellant may not hold the fee simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant is, therefore, for all practical purposes, the substantial owner. The fee subject to its use and easement is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be

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specially benefited by the local improvement. The benefit is presumed to inure, *not to such present use, but to the property itself*, affecting its value. . . . It is also elementary that the whole theory of special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the local improvement."

Were the use which the Northern Pacific Railway Company will make of Westlake avenue to be discontinued, we could not hold the street divested of such use to be benefited and assessable. The principles announced in the later case of *Seattle v. Seattle Elec. Co.*, 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486, are applicable here. Speaking of the franchise of the Seattle Electric Company, we then said:

"The respondent's right in the street is in no sense a lot, block, tract or parcel of land. It does not own the fee of the street over which its tracks are laid and its cars operated, nor does it have dominion or control over that portion of the street. On the contrary, the fee of the street rests in the abutting property holders, to whom it will revert when the interests of the public therein cease from any cause, and dominion and control over it is vested in the public authorities in whom it will remain as long as the street retains its public character. The respondent's rights therein are such and only such as these public authorities have conferred, and are, roughly speaking, the right to construct and maintain for a limited time a railway track on a fixed portion of the street, and the right to operate cars on such track for the purpose of carrying passengers and freight for hire. This does not constitute either a lot, block, tract or parcel of land, nor does it constitute an interest in land as that term is ordinarily understood, it is an easement only, and as such is not assessable under a power to assess lots, blocks, tracts and parcels of land."

From statements above made, it appears that the city in granting the franchise imposed conditions upon the railway company which would compel it to make a substantial cash contribution towards defraying the expense of this improvement. Manifestly it did so in contemplation of the fact that the right of way and franchise in the street could not be

assessed. We find no merit in appellants' objection. The judgment is affirmed.

CHADWICK, MOUNT, ELLIS, and MORRIS, JJ., concur.

[No. 9735. Department Two. December 19, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
GEORGE W. WORKMAN, *Appellant*.¹

RAPE—"INTERCOURSE"—EVIDENCE—SUFFICIENCY. A conviction of statutory rape is sustained by the testimony of the prosecutrix that the defendant had "intercourse" with her, where it appears that she meant sexual intercourse and fully comprehended her statements.

RAPE—EVIDENCE—CORROBORATION—SUFFICIENCY. In a prosecution for statutory rape, evidence that the defendant had admitted a similar act with the prosecutrix is sufficient corroboration of her testimony, and any doubt as to the meaning of the language used in the admissions raises a question for the jury.

RAPE—PREVIOUS CHASTE CHARACTER—REPUTATION—EVIDENCE—ADMISSIBILITY. In a prosecution for statutory rape under Rem. & Bal. Code, § 2436, relating to carnal knowledge of a female of previous chaste character between fifteen and eighteen years of age, evidence is admissible on the part of the defense of the previous general reputation of the prosecutrix as to unchastity, as going to her credibility as a witness, but is not admissible to prove her unchaste condition (CHADWICK, J., dissenting).

CRIMINAL LAW—TRIAL—SEVERAL OFFENSES—ELECTION—NECESSITY. In a prosecution for statutory rape upon a female of previous chaste character between fifteen and eighteen years of age, where the evidence tends to show three distinct offenses occurring at different times and places, it is reversible error for the court to deny defendant's motion, after the testimony is in, to compel the prosecution to make an election as to the offense relied upon for conviction.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 6, 1911, upon a trial and conviction of rape. Reversed.

A. G. McBride, for appellant.

John F. Murphy and Crawford E. White, for respondent.

¹Reported in 119 Pac. 751.

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Opinion Per ELLIS, J.

ELLIS, J.—Appeal from a judgment entered upon a verdict convicting the appellant of the crime of statutory rape.

The refusal of the court to direct a verdict of acquittal upon appellant's motion after the state had rested is the first assignment of error. It is claimed that, because the prosecuting witness testified that she had "intercourse" with the appellant, that this was not sufficient to prove sexual intercourse. One authority, *People v. Howard*, 143 Cal. 316, 76 Pac. 1116, so holding is cited, but we are not inclined to follow so technical a rule. It is plain from the whole of her testimony that she meant sexual intercourse and fully comprehended what she was talking about.

It is also contended that there was not sufficient corroboration of the testimony of the prosecuting witness, as required by the statute. Rem. & Bal. Code, § 2443. One witness testified to an admission of a similar act by the appellant with the prosecuting witness. If this admission was made, it was sufficient corroboration. *State v. Jonas*, 48 Wash. 133, 92 Pac. 899. While it is urged that the language used in the admission, by a very strained and unnatural construction, might mean something else, its use was undisputed, and it was for the jury to say whether there was any reasonable doubt as to its meaning.

The principal ground of defense was the claim that the prosecutrix was not of a "previously chaste character," as required by the statute (Rem. & Bal. Code, § 2436), she being over fifteen and under eighteen years of age. The court refused to admit evidence of her previous general reputation as to chastity, holding that there should be some evidence of previous specific acts of unchastity with other men before evidence as to her general reputation in that respect would be admissible.

The obvious purpose of the statute is to protect females over fifteen and under eighteen years of age even in case of actual consent. The words "previously chaste character," as used in the statute must, therefore, be construed to mean

an actual physical condition, as distinguished from a chaste state of mind as shown by general conduct. Evidence of a reputation for unchastity would tend to negative the latter, while evidence of specific acts would tend to negative the former. In cases where lack of consent is a material element of the crime, it has usually been held that evidence of prior reputation for unchastity is admissible only as tending to show probable consent. Obviously such evidence would not be admissible in cases of statutory rape where consent is not material.

“When the statute makes carnal knowledge of a female of previous chaste character under a specified age rape, chastity is presumed until the contrary is proved, and want of chastity in such cases must be shown by specific acts and not by general reputation.” 33 Cyc. 1482.

See, also, Underhill, Criminal Evidence (2d ed.), § 418; 10 Ency. of Evidence, pp. 602, 603. Such evidence of general reputation for unchastity, however, would be admissible, not as a defense, but as going to the credibility of the prosecuting witness. *State v. Coella*, 3 Wash. 99, 28 Pac. 28; 33 Cyc. p. 1482.

Error is also predicated upon certain instructions given by the court. What we have said touching the admission and effect of evidence, however, disposes of the questions raised on instructions and no good purpose would be served by reviewing them.

The state's evidence tended to prove three distinct commissions of the offense occurring at different times and places. At the close of the state's case, the appellant moved the court to require the prosecution to elect which one of these it would rely upon for a conviction. The court denied the motion. This ruling was excepted to, and is assigned as error. We think that, both on reason and authority, this assignment is well taken. In case of conviction, where the evidence tends to show two separate commissions of the crime, unless there is an election it would be impossible to

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know that either offense was proved to the satisfaction of all of the jurors beyond a reasonable doubt. The verdict could not be conclusive on this question, since some of the jurors might believe that one of the offenses was so proved and the other jurors wholly disbelieve it but be just as firmly convinced that the other offense was so proved. The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them. The true rule would seem to be that, while evidence of separate commissions of the offense may be admitted as tending to prove the commission of the specific act relied upon, the proper course in such a case, after the evidence is in is to require the state to elect which of such acts is relied upon for a conviction. *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096; *State v. Sargent*, 62 Wash. 692, 114 Pac. 868.

We are constrained to hold that the refusal of the court to require an election by the state was prejudicial error. For this reason, the judgment is reversed and the cause remanded for a new trial.

DUNBAR, C. J., MORRIS, and CROW, JJ., concur.

CHADWICK, J. (dissenting in part)—Considering the history of the act upon which this case rests, I think evidence of general reputation for unchastity should be received for all purposes, and to that extent I disagree with the reasoning of Judge Ellis. I concur in the result.

[No. 9511. Department One. December 20, 1911.]

L. E. VAN WINKLE, *Receiver etc., Appellant*, v.

A. G. MITCHUM *et al., Respondents*.¹

CHATTEL MORTGAGES—FILING AND RECORDING—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 3661, requiring chattel mortgages to be "filed" with and indexed by the county auditor and that they shall "remain on file for the inspection of the public," and § 3665, providing that chattel mortgages to secure the sum of \$300 may be "recorded" and indexed with like force and effect as if this act had not been passed, but that they shall "also be filed and indexed as required by this act," a chattel mortgage for over \$300, if recorded, need not remain on file, in order to give notice thereof to creditors of the mortgagor.

CHATTEL MORTGAGES—STOCK OF GOODS—POSSESSION AND SALES BY MORTGAGOR—FRAUD UPON CREDITORS. A chattel mortgage of a stock of goods which permits the mortgagor to remain in possession, and by contemporaneous parol agreement to sell goods for the purpose of replenishing his stock and paying expenses instead of applying all of the proceeds to the payment of the mortgage debt, is not fraudulent as to creditors unless it was given for the purpose of aiding the mortgagee to accomplish that purpose.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered January 5, 1911, in favor of the defendants, dismissing an action to set aside a chattel mortgage foreclosure and sale, as a fraud upon creditors of an insolvent corporation, upon sustaining a demurrer to the complaint. Affirmed.

H. J. Hibschan, for appellant.

Merritt, Oswald & Merritt, for respondents.

DUNBAR, C. J.—The complaint, to which a demurrer was sustained, alleged in substance that Mitchum, Green, and Adams, as copartners, were conducting a bank under the name of Bank of Harrington; that the insolvent corporation for which appellant was appointed receiver gave the said

¹Reported in 119 Pac. 748.

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Opinion Per DUNBAR, C. J.

Bank of Harrington a chattel mortgage of all its personal property, which mortgage was afterwards recorded in the proper county, but that neither the original chattel mortgage nor a copy of it was left on file in the office of the county auditor; that the creditors named in the complaint as having presented their claims to the receiver knew nothing about the execution and delivery of the mortgage, and had no notice or knowledge regarding it; that afterwards the respondents instituted foreclosure proceedings by the summary methods provided by statute, and that the goods were sold under such procedure; that, during the interval which elapsed between the execution of the mortgage and the sheriff's sale, the insolvent corporation was in full possession of all the property described in the mortgage (which it is not necessary to describe here); that it used and sold the merchandise in its possession after a mortgage was given in the regular course of its business, purchasing other merchandise and commingling the same, etc.; that the creditors named sold to said corporation materials, goods, wares and merchandise of the value of \$1,300, which claims were due and owing at the time the appellant was appointed receiver and at the time of the verification of the complaint; asked that the aforesaid mortgage and the attempted foreclosure thereof and sale thereunder be adjudged null and void, and held for naught as against the plaintiff, and that he have judgment for the delivery to him of all property described in said mortgage; and that, if such delivery could not be made, he have judgment against the defendants for the full value thereof, together with costs. This action was brought by the receiver for the benefit of the creditors. This is a sufficient recital of the allegations of the complaint for the purposes of the determination of this case.

There are two main contentions relied upon by the appellant, and only two that are discussed in the brief. A third argument is made, to the effect that the receiver is the proper person to attack the validity of the mortgage,

but this proposition is confessed by the respondents, and it is not necessary to notice it here. The first proposition is that the chattel mortgage, although it may be recorded, must also be left on file in the office of the county auditor, or else a certified copy of it must be left on file there, in order to be notice to creditors; and that simply recording the chattel mortgage, without leaving it on file or leaving a certified copy there, does not constitute notice. The second is that, where the mortgagor of a stock of merchandise is allowed to remain in possession and to dispose of the goods in the ordinary course, appropriating the proceeds of the sale thereof without the knowledge and consent of the mortgagee, the mortgage is void as to creditors. On the first proposition it would be adding something to the statute to hold that the mortgage which had been recorded should be left on file after it was so recorded. Section 3661, Rem. & Bal. Code, provides:

“Every such instrument [referring to chattel mortgages] within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, and such auditor shall file all such instruments when presented for the purpose, upon the payment of the proper fees therefor, indorse thereon the time of reception, the number thereof, and shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, used exclusively for that purpose, ruled into separate columns with appropriate heads, ‘The time of filing,’ ‘Name of mortgagor,’ ‘Name of mortgagee,’ ‘Date of instrument,’ ‘Amount secured,’ ‘When due,’ and ‘Date of release.’ An index to said book shall be kept in the manner required for indexing deeds to real estate. . . . Such instrument shall remain on file for the inspection of the public.”

If this were the only section to construe, appellant's contention would undoubtedly be correct, the direction being definite and certain, and for the very good reason that, if the mortgage did not remain on file, there would be no notice whatever of what the mortgage contained, as there is no

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record of it. But Rem. & Bal. Code, § 3665 provides as follows:

“A mortgage given to secure the sum of three hundred dollars or more exclusive of interest, costs and attorneys or counsel fees may be recorded and indexed with like force and effect as if this act had not been passed, but such a mortgage or a copy thereof must also be filed and indexed as required by this act.”

This has reference to another class of mortgages, with a method for giving notice distinct from the other. Here the method is by recording, and there is no mandatory provision that it shall remain on file after it is recorded, presumably for the reason that there is no necessity for it so to remain, for it would add nothing to the notice given by the record provided for. It is true that § 3665 provides that a copy thereof must also be filed and indexed as required by the act, but the solicitude of the statute in that regard is directed to the index, and of course it could not very well be indexed unless it was filed. But the statute not requiring it to be kept on file, as in § 3661, and there being no benefit to flow from such a requirement, we are not inclined to interpolate the requirements into the statute by construction. Hence, we hold that the statutory notice was complied with.

On the second proposition, it has been the law of this state since the announcement of the rule in *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604, that an indemnity mortgage upon a stock of goods which permits the mortgagor to remain in possession and, by parol agreement made at the time of its execution, permits him to appropriate part of the proceeds of the sale of the property for the purpose of replenishing the stock and paying the current expenses of the business, instead of applying all the proceeds to the payment of the indebtedness for which the mortgage was given, is not fraudulent as to other creditors, unless the mortgage was given for the purpose of aiding the

debtor to defraud such other creditors. This is an exhaustive opinion, reviewing the earlier territorial cases cited by the appellant in this case in support of its contention. The mercantile interests of the state have relied upon the law thus announced for nearly twenty years, and it would work a grave injustice to now modify or change the rule.

There being no fraud alleged, and the principles involved in this case being identical with the principles involved in the case mentioned, the judgment is affirmed.

MOUNT, PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9625. Department Two. December 20, 1911.]

D. P. HAYES, *Administrator etc.*, Appellant, v.
JOHN GASTON, *Respondent*.¹

LIFE ESTATES—FAILURE TO PAY TAXES—WASTE—ACTIONS—PARTIES PLAINTIFF. An action for the appointment of a receiver of a life estate and to compel the payment of taxes and assessments by the life tenant and prevent waste, cannot be maintained by the administrator with the will annexed, for the benefit of the remainderman without making him a party, neither the administrator nor the remainderman having paid the taxes, since the remainderman is the real and indispensable party in interest.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 11, 1911, dismissing an action for the appointment of a receiver of a life estate in lands, for insufficiency of the complaint to state a cause of action. Affirmed.

Sharpstein & Sharpstein, for appellant.

Rader & Barker, for respondent.

MORRIS, J.—Hannah Gaston died in 1886, leaving an estate in Walla Walla, and a last will and testament whereby, so far as the same is here material, a life estate was created

¹Reported in 119 Pac. 818.

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in her husband, John Gaston, in the north half of two certain lots. The executor was then directed to sell the remaining estate, and the money to be derived from such sale was bequeathed to certain relatives. The executor subsequently died, and appellant was appointed administrator with the will annexed. No taxes have been paid on this lot since 1906, and certain local improvement assessments have also been levied against it, which are likewise unpaid. The appellant brought this suit, setting forth the above facts; and, after alleging the rental value of the lot as "about \$300 per annum," and the neglect and refusal of respondent to pay these taxes and assessments, and the consequent jeopardizing, depreciation, and waste to the estate in remainder, prayed for the appointment of a receiver of the life estate of John Gaston, to collect the rents, sell the life estate, and apply the proceeds in payment of these various liens, and for judgment against the life tenant in the sum of \$7,200 (the amount of the liens, we assume), less the amount derived from rentals and the sale of the lot. John Gaston made no appearance in the court below. The court, however, held that the complaint failed to show a right of action in appellant, and dismissed the action, and this appeal follows. Both parties appear in this court.

Many questions are discussed in the briefs which we will not attempt to discuss, it appearing to us that they are not material to the only point involved in the appeal—the sufficiency of the complaint. Upon this point, we sustain the ruling of the lower court. The action is purely one on behalf of the remainder in this estate. It is either for the benefit of the remainderman to have the life estate sold for the payment of these taxes, or else it is against his interest. In either event, he is a necessary party to the action and, under the allegations of the complaint, the only one who can maintain this action. Conceding the law to be that it is the duty of the life tenant to pay the current taxes when the estate is sufficient for that purpose, and that, when any

other party on his default is compelled to pay such taxes to protect his own interests, he has a remedy over for the recovery of the amount so paid, such does not appear to be the case here. Neither the administrator, nor any other person whom the administrator rightfully represents, has paid these taxes. It will also be admitted that the neglect or refusal of the life tenant to pay the current taxes constitutes waste as against the remainderman, and subjects the estate in remainder to a forfeiture in payment of the tax lien. But this jeopardizing of the estate in remainder does not of itself give any right of action to the administrator. Such right of action rests in the one whose estate is being endangered and who will suffer because of the loss and waste. There are cases holding that where, under some peculiar authority conferred by the will, the executor has paid taxes or interest on incumbrances upon the estate, he could recover as against the life tenant whose duty it was to make such payment. But that is not this case.

We do not think it necessary to discuss the matter further. The judgment is sustained.

DUNBAR, C. J., CHADWICK, ELLIS, and CROW, JJ., concur.

[No. 9663. Department Two. December 20, 1911.]

C. H. BALDWIN, *Respondent*, v. E. F. MILLS, *Appellant*.¹

ATTORNEY AND CLIENT—COMPENSATION—EXCESSIVE FEES. An attorney's charges of \$50 each for appearing in numerous cases in justice court in trivial matters are excessive and exorbitant.

SAME. An attorney's charge of \$375 for making up the issues in a simple ejectment suit is an unreasonable fee.

SAME. An attorney's charge of \$75 for writing a few letters concerning the price of a jack is unreasonable.

SAME. An attorney's charges of \$200 a year for general legal services, so mystical and indefinite that they cannot be itemized, no real legal questions being involved, are excessive.

¹Reported in 119 Pac. 816.

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Opinion Per MORRIS, J.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered December 12, 1910, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Fred E. Helwig (*Fred E. Butler*, of counsel), for appellant.

Ben F. Tweedy and *Elmer E. Halsey*, for respondent.

MORRIS, J.—The appellant in this appeal seeks a review of a judgment against him for attorney fees in the sum of \$1,377. No findings of fact were made by the trial court, except in so far as the court incorporated in the judgment a general finding "that the allegations in the complaint are true; that all the charges made against the defendants are reasonable," except one for \$75, which is reduced to \$25. To this judgment, general and special exceptions were taken, and the question now before us is the sufficiency of the evidence to sustain the judgment. Having read the evidence, we are of the opinion that the exception to its sufficiency is well taken, and that the fees allowed by the court are excessive.

Two of the cases in which a fee of \$50 each was charged and allowed were cases in the justice court, one for wages and the other on an account, in both of which appellant was defendant. Another was for representing appellant in three criminal cases in the same court, in one of which appellant was charged with a nuisance for throwing a dead horse into a river, appellant subsequently taking the horse from the river and burying it upon learning of his violation of the law. Fifty dollars was charged for appearing in this defense. The other two were also before the justice, in which appellant appeared as complaining witness in charges of assault and battery, having his tenant arrested in one case and the wife and daughter of the tenant in another. One hundred and fifty dollars was charged and allowed for appearing on behalf of the state in these two instances. In the

nuisance case, appellant was convicted and appealed to the superior court, where he was acquitted, and was charged \$150 in that court.

Respondent sat by the side of appellant while he was offering final proof on some land he had taken up, for which \$50 was charged. He also appeared for appellant and filed a demurrer in an action brought by another attorney for the recovery of fees, for which he charged \$75. This charge the court below reduced to \$25. He brought an action in ejectment against a tenant, which had proceeded as far as making up the issues, when he withdrew, charging \$375. Appellant had purchased a jack, and sought to obtain a reduction in the price to be paid on account of some alleged faults in the animal. Respondent was employed and wrote some letters and obtained a reduction in the price; how much we are unable to say. Respondent says he spent some time in this matter, but cannot say how many letters he wrote. Appellant says he wrote two. A charge of \$75 was made for this service.

A general charge of \$750 is made for advice during the years 1907, 1908, 1909, and part of 1910. Respondent is unable to give any definite testimony as to the character of this advice, further than to say that appellant kept running into his office and taking up his time with a lot of immaterial matters that he cannot now recall. To use his own language, these matters were "all myths and nothing to them," and yet to strengthen his case he says he had to spend a great deal of his time in the supreme court library at Lewiston, Idaho, where he then resided, looking up the law on these myths. He also testified to spending much time and making extensive briefs in preparing for trial in the other cases referred to. From the nature of the legal questions involved in those matters, we fail to appreciate the necessity for extensive briefing.

It may be that there are cases triable before a justice of the peace where a fee of \$50 would not be excessive, or rep-

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resenting the complaining witness upon a charge of assault and battery in the same court might make a charge of \$50 reasonable; but from what we can gather from the record as to the cases here involved, in that court the charges were excessive and exorbitant. Neither can we agree that to charge \$375 to make up the issues in a simple ejectment suit is a reasonable fee. Nor to charge \$75 for writing a few letters concerning the price of a jack. Nor \$200 a year for general legal services, so mystical and indefinite that they cannot be itemized. Inasmuch as a new trial is to be ordered, we refrain from further comment upon the evidence, except to say that it does not sustain the judgment. Neither do we offer suggestion as to whether \$420 which respondent admits receiving from appellant, is a sufficient recompense for his labors.

The judgment, being excessive and not sustained by the evidence, is reversed, and a new trial ordered.

DUNBAR, C. J., CHADWICK, ELLIS, and CROW, JJ., concur.

[No. 9502. Department One. December 20, 1911.]

GEORGE H. FARWELL *et al.*, *Appellants*, v. GEORGE BRISSON
et al., *Respondents*.¹

WATERS AND WATER COURSES—RIPARIAN RIGHTS—PRESCRIPTION. Riparian rights to the waters of a creek are lost by adverse possession, where, for more than the statutory period, an upper proprietor, continuously appropriated and diverted the waters in good faith under a claim of right adverse to the lower owner.

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—WATERS—RIPARIAN RIGHTS. Where a lower riparian owner brought an action claiming forty inches of the flow of a creek, and was adjudged the prior right to use but nine inches, as the "reasonable portion" of the waters belonging to him, the judgment is *res judicata* and a bar to a second action brought against the same parties to determine his rights to the waters as a riparian owner.

¹Reported in 119 Pac. 814.

Appeal from a judgment of the superior court for Chelan county, Grimshaw J., entered January 26, 1911, upon findings in favor of the defendants, in an action to determine riparian rights, after a trial on the merits. Affirmed.

Henry Crass and *John E. Porter*, for appellants.

W. O. Parr and *Parr & Hubbard*, for respondents *Brisson*.

Reeves, Crollard & Reeves, for respondents *Tanner et al.*

MOUNT, J.—Plaintiffs brought this action for the purpose of determining the rights of riparian claimants to the waters of a certain creek known in the record as Canyon No. 2 creek. All persons owning lands along this creek were made parties. Certain parties appeared and contested the claims of the plaintiffs. Upon a trial of the cause, the court concluded that the use of the waters of the creek, “by the above named defendants as riparian owners, has not been unreasonable nor in excess of their reasonable rights as such riparian owners, and that plaintiffs have received at all times a reasonable proportion of the waters of said stream.” A decree was accordingly entered in favor of defendants. The plaintiffs have appealed.

Several assignments of error are made, but the only contention of the plaintiffs is that the court erred in not apportioning the water of the creek to the riparian owners according to the number of acres of land riparian to the stream. It appears that this creek rises in the mountains in Chelan county, and flows in an easterly direction about twelve miles to the Columbia river. The stream is a small one, and except in the early spring, when the snows are melting, the water does not have a continuous flow upon the surface of its bed, but in places sinks and again rises to the surface in its progress. The foot hills on each side of the stream rise rather abruptly. The stream is small and narrow, and the lands upon its banks are known as bench lands.

The lands of the respective parties to the suit are located

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along the stream, from its source toward its mouth, in the following order: (1) Defendants Martin's land; (2) defendants Tanner's land; (3) defendants Brisson's land; (4) plaintiffs Farwell's and Underwood's land; (5) defendants Dorman's land (the Dormans made default); (6) plaintiff Farwell's land. It appears that, in the year 1906, the plaintiff Farwell brought an action against these same defendants and others, claiming forty inches of water from said creek, and seeking to enjoin the defendants in that action from interfering with his use of that amount of water. In that action the court denied his claim to forty inches, but found that he was entitled to nine inches of water, and entered a decree accordingly. No appeal was prosecuted, and the judgment became final. The appellant Farwell in this action is apparently claiming an additional amount of water by reason of his alleged riparian rights. On the trial, the court in this case found as follows:

"That the defendant Brisson at all times since his occupancy of the lands now held by him in section 13, township 22, north of range 19, and for more than ten years prior to the commencement of this action, has claimed the right to, and has in good faith, diverted and used for irrigation and domestic purposes, all the waters flowing in said stream at the point of intake as used by him during the irrigation period when water has been low in said stream. That as disclosed by the evidence, at such times when he would be using all the surface flow in said creek by diversion at his intake, there would be about twice as much water flowing in the creek bed a short space below his point of diversion as would be flowing therein at the point of such diversion, so that Brisson's use of the water during such periods allowed him approximately one-third of the total flow of said creek above the point of diversion of plaintiffs Farwell. That such diversion by defendant Brisson has at all times been continuous, open, notorious, and under claim of right adversely to the plaintiffs and to all the world, and has been made at times when the plaintiffs were desirous of irrigating their said lands and were demanding said waters for use in the irrigation thereof. That said use by defendant Brisson

was by diversion at a point on said stream which is above the lands, or any of the lands, of plaintiffs, and such use deprived said plaintiffs of water which would otherwise have flowed down to the lands of plaintiffs and been there applied to irrigation, stock and domestic use. That as between the defendants Brisson and the owners and occupants of the tract known herein as the Underwood tract, the diversion and use by said defendants Brisson has been in all things and at all times under the same claim of right, for the same length of time, and with the same effect as to deprivation of water for use upon the said Underwood tract, as is set forth in finding fifteen, first above."

The evidence is sufficient to sustain these findings. It is apparent, therefore, that, whatever riparian rights the appellants may have had at one time in the water which had been continuously used by the defendant Brisson, such right has been lost by adverse user for the statutory time (*Mason v. Yearwood*, 58 Wash. 276, 108 Pac. 608, 30 L. R. A. (N. S.) 1158), even though there was no adjudication of such rights in the former action. It is clear, however, that the riparian rights of plaintiffs were adjudicated in this action, for the court concluded that "plaintiffs have received at all times a reasonable portion of the water of said stream." This was clearly an adjudication of the riparian rights, and also that defendants had not interfered with the plaintiffs' rights. The court was not necessarily bound to apportion a certain amount of water per acre of land in order to determine the riparian rights, for such rights are based upon reasonable use. 30 Am. & Eng. Ency. Law (2d ed.), p. 356.

Judgment affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ.,
concur.

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[No. 9636. Department One. December 20, 1911.]

FARMERS & MERCHANTS BANK OF WENATCHEE, *Appellant*, v.
JOHN C. LILLY, *Administrator etc., Respondent*.¹

EXECUTORS AND ADMINISTRATORS—ACTIONS—LIMITATIONS—REJECTION OF CLAIM. An action not being commenced so as to toll the statute of limitations until the complaint is filed, an action upon a claim against an estate which was rejected January 2, is not commenced within three months thereafter, as required by Rem. & Bal. Code, § 1477, when the complaint was not filed until April 6, following.

SAME—DATE OF REJECTION—NOTICE. Where a claim against an estate was rejected January 2, because not filed within one year, and on solicitation of the claimant seeking a reconsideration, the administrator took the matter up with his attorneys, and wrote on January 20th that the attorneys' "position is the same as mine—that I cannot allow the claim," the claimant was not misled or prejudiced in bringing an action within three months from the rejection of the claim, which dates from January 2, and not January 20.

Appeal from a judgment of the superior court for Chelan county, Yakey, J., entered November 17, 1910, upon findings in favor of the defendant, in an action upon a claim against an estate, after a trial before the court without a jury. Affirmed.

Austin E. Griffiths and Ludington & Kemp, for appellant.
Peters & Powell, for respondent.

MOUNT, J.—This action was brought against the administrator of the estate of Jacob M. Tompkins, deceased, upon a claim against the estate. Two defenses were interposed: (1) that the claim was not presented within one year after notice to creditors; and (2) that the action was not brought within three months after the claim was rejected by the administrator. The trial court found in favor of the defendant upon both these grounds, and dismissed the action. Plaintiff has appealed.

¹Reported in 119 Pac. 749.

It appears that on December 19, 1906, letters of administration upon the estate of Jacob M. Tompkins, deceased, were issued to John C. Lilly. On December 20, 1906, the administrator caused a notice to creditors to be published, requiring all persons having claims against the estate to present such claims within one year from that date. On April 2, 1907, the plaintiff presented a verified claim, amounting to \$6,340.18, to the administrator. About a month later, and before the administrator had taken any action on the claim, Mr. W. A. Thompson, then an officer of the plaintiff bank, called attention to the fact that a mistake had been made in the claim, and that one item thereof was about \$40 more than it should be. He thereupon withdrew the claim for the purpose of making the correction. The claim was not returned to the administrator until December 27, 1907, about a week after the expiration of the time for presenting claims against the estate. The administrator thereafter, on January 2, 1908, marked the claim rejected, and returned it to the plaintiff with the information that the claim was rejected because it had not been presented within the year. Plaintiff then endeavored to persuade the administrator that the first presentation of the claim was sufficient, and was informed by the administrator that he would take the question up with his attorneys, which he did; and on January 20, 1908, he wrote to the plaintiff, saying: "Their position is the same as mine—that I cannot allow the claim." Thereafter on April 1, 1908, this action was begun by the service of a summons and complaint, but the complaint was not filed until April 6, 1908, more than three months after the rejection of the claim on January 2.

We shall not consider the question whether the administrator properly or improperly rejected the claim, for our view upon that question becomes of no importance in view of our conclusion upon the question whether the action was barred by lapse of time. It is conceded that the claim was rejected and notice thereof given on January 2, 1908, and

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it is also conceded that the complaint was not filed until April 6, 1908. The statute provides, at Rem. & Bal. Code, § 1477:

“When a claim is rejected by either the executor, administrator, or the court, the holder must bring suit in the proper court against the executor or administrator within three months after the rejection, otherwise the claim shall be forever barred.”

See, also, § 164. This court has uniformly held “that an action is not deemed commenced so as to toll the statute of limitations until the complaint is filed, though it may be deemed commenced for other purposes by the service of summons and complaint.” *Blalock v. Condon*, 51 Wash. 604, 99 Pac. 733, and cases there cited.

Appellant seeks to avoid this position by insisting that the final rejection of the claim was not made until January 20, 1908, because, after the rejection on January 2, the administrator again took the question under consideration; and that plaintiffs were thereby misled. While it is true that the administrator did consider the question further after he had rejected the claim, this was done at the solicitation of the plaintiff, and there is no evidence that the administrator did not act with reasonable promptitude, or that he led the plaintiff to believe that the date of the first rejection should not stand as the date of final rejection. He said in his notification on January 20, that he had taken the claim up with his attorneys, and “they say their position is the same as mine—that I cannot allow the claim.” The plaintiff must have understood from this that the rejection of the claim was not changed but was affirmed—nothing more, and that no extension of time was granted or intended. There was still more than two months’ time left within which plaintiff might bring its action. This was ample time. If the administrator had delayed a reconsideration of his ruling so that there was not sufficient time within which to bring the action, we would be inclined to hold that plaintiff had

been misled by his conduct. But we are satisfied that the delay was wholly the fault of the plaintiff, and that by their own neglect the time passed.

The judgment is affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9692. Department One. December 20, 1911.]

MABEL J. MORIN, *Respondent*, v. SAUL J. MORIN,
Appellant.¹

DIVORCE—CUSTODY OF CHILD—MODIFICATION OF DECREE—EVIDENCE—SUFFICIENCY. A judgment of divorce on the ground of cruelty of the husband, awarding the custody of a child, eight years old, to grandparents, with whom the wife was residing, should be modified so as to give the husband custody of the child where, nine months after the decree, the wife was adjudged insane and sent to an asylum, and the evidence shows that the husband had a suitable home and family and was in every way a proper person to have the custody of the child.

Appeal from a judgment of the superior court for Kitsap county, Yaakey, J., entered March 11, 1911, denying an application to modify a decree of divorce as to the custody of a child, after a hearing on the merits before the court without a jury. Reversed.

Kerr & McCord and *W. L. Read*, for appellant.

Jas. W. Carr, for respondent.

PARKER, J.—This is a controversy over the custody of a child, now about eight years old. The defendant, the father of the child, has appealed to this court from an order of the superior court for Kitsap county denying his petition for the modification of the decree rendered by that court May 20, 1910, in this case, divorcing the plaintiff from him, in

¹Reported in 119 Pac. 745.

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so far as that decree deprived him of the custody of this child.

The only portions of the divorce decree brought here by this record relate to the monthly allowance for support of the plaintiff and the child, and to the custody of the child. It is apparent, however, from other parts of the record before us, that the divorce was granted upon the ground of the cruelty of the defendant to the plaintiff. By the terms of the decree, the child was to remain the ward of the court until further order, and the court then placed it in the temporary custody of its grandparents, the father and mother of the plaintiff. This was done evidently upon the theory that the father was not a proper person to care for the child because of his acts of cruelty to the mother, and that the mother was not a proper person to have the custody of the child because of her then weakened mental condition. The placing of the child in the custody of the grandparents did not deprive the mother of its society, since she was then, and expected to continue, living with the grandparents, to whom the support money, both for her and the child, was by the decree directed to be paid. The decree gave the defendant the right to visit the child, and to have the child visit him at reasonable times.

Thereafter, in July, 1910, the plaintiff was adjudged insane by the superior court for Kitsap county, and committed to the Western Washington hospital for the insane, at Steilacoom. Thereafter plaintiff filed his petition for the custody of the child, and to be relieved from paying to the grandparents the allowance for its and the mother's support. The court then appointed James W. Carr, as guardian *ad litem*, to represent the plaintiff upon the hearing of the petition, and thereupon an answer to the petition was filed by him. On March 9, 1911, over nine months after the rendering of the original decree denying the defendant the custody of the child, the issues thus made came on for trial. We note the length of this period between the granting of the original

decree and this hearing, because it is upon the conditions existing during this period that the right of the defendant to the child largely depends. That is, he must show such changed conditions, and meritorious qualifications on his part, after the date of the decree, to properly care for the child, as will overcome the presumption against him to the contrary from the decree at the time of its rendition.

The evidence produced upon the hearing has all been brought here by statement of facts, and from it the following appears: The defendant has a good home in a good residence district in the city of Seattle. This home consists of a well equipped residence which, with the grounds and his shop on the back part thereof, is worth from \$12,000 to \$15,000, and is within a short distance of a public school. He has lived in this home for many years. It represents the accumulation of his frugality and industry as a mechanic and a manufacturer, in a small way, of a saw filing and setting device which is his own invention. His wife lived at this home with him until the separation, when she went to the home of her parents, in Kitsap county, and soon thereafter commenced this action for divorce. After the separation, he had a middle aged woman at his home as housekeeper, who as such took care of his home for about six months. This woman testified to his good behavior and kindly disposition, especially to his kindly treatment of his child, it being there to visit the father for several days at one time during that period. She also testified that he was a liberal and good provider for the home. This housekeeper ceased to work for the defendant upon his niece coming to live with him, which was about the last of August, 1910. Thereupon his niece became his housekeeper and has remained such ever since. She is a young woman about 20 years old. She is the oldest of a family of several children, and has had considerable experience in assisting in the care and rearing of her younger brothers and sisters. It is very evident from the testimony of her neighbors, who are well

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acquainted with her, that she is a very competent housekeeper and would be a suitable person to assist in the care of the child. The arrangement between her and the defendant seems to contemplate that she stay with him indefinitely. A nephew of the defendant also lives with him. These three live together as a family. This niece testifies that the defendant is of kindly disposition, and that he provides well for his home. Also that he spends his time at his home when not at his work. Two other women who live near the defendant, and who are evidently quite well acquainted with him and his niece, testify to his kindly disposition toward the members of his family, and also to the competency of his niece as a housekeeper and one suited to assist in the care of his child. Three men who are well acquainted with the defendant and with his habits generally, though not knowing much of his home life, testify that he is industrious and temperate, and of good reputation.

All of this testimony touching the habits, disposition, and mode of life of the defendant, relate to his conduct since the granting of the decree of divorce, when he was deprived of the custody of his child. It is plain from the whole testimony that he loves his child very much, and that the child has an equal affection for him. At the time of the hearing, the mother was still in the hospital for the insane and the child in the custody of its grandparents. During the taking of the testimony upon this hearing, counsel for the defendant attempted to show the suitability of the defendant to have the custody of his child, by showing his disposition and mode of life as it existed prior to the granting of the divorce; but, upon objection of the guardian *ad litem* for the plaintiff, the court declined to receive evidence so showing. There was no competent evidence offered in contradiction of these witnesses.

In order, then, to determine the defendant's right to the child at this time, we have the changed condition of the plaintiff, who is no longer in a condition that she can pos-

sibly have the comfort and society of her child, and the undisputed evidence of these witnesses, which, standing alone, clearly shows the fitness of the defendant to have the care and custody of his child. Were it not for the presumption arising against him from the decree of the divorce, in effect adjudging that he was not at that time a suitable person to have the custody of the child, there would now seem to be no question whatever as to his rights in that regard. It is not an easy matter to measure the weight of the presumption against the defendant as to his fitness to have the care of his child, arising from the decree adjudging him to be unfit at the time of its rendition. Of course that is not a presumption which he could overcome by good conduct on his part for a short period of time following the entry of the decree, but it seems to us that his good conduct of the nature so clearly shown by this evidence, covering a continuous period of nine months following the entry of that decree, is sufficient to overcome the presumption arising against him from the decree at this time, giving to that decree every presumption it is entitled to as establishing his unfitness at the time of its rendition. We are not advised of the nature of the defendant's shortcomings at and prior to that time. At the instance of the guardian *ad litem*, the court closed the door to inquiry by defendant's counsel upon that question. Under such circumstances, we are not justified in presuming that plaintiff's faults were so serious that they have not become cured by this nine months of good conduct; at least, sufficiently to call for a modification of the decree in that particular.

The guardian *ad litem* seems to wage this contest, in some degree at least, upon the theory that these grandparents have some right to the custody of this child. This is wholly untenable. They were only given the custody of the child as the agent of the court, and even then only temporarily, with the full knowledge that the child might be taken from them at any time. The legal right of the father to the

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custody of this child, since the mother is insane, and therefore cannot enjoy its society, is beyond question unless the father is clearly unfit to have its custody. As was said in *In re Neff*, 20 Wash. 652, 56 Pac. 383:

"He has the natural and legal right to the custody and control of the children, unless so completely unfit for such duties that the welfare of the children themselves imperatively demanded another disposition of their custody."

In this case the grandparents have the custody of the child by authority of the order of the court, not because of any inherent right they possess to have such custody. *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 Pac. 660, 43 Am. St. 839; *Carey v. Hertel*, 37 Wash. 27, 79 Pac. 482. Of course it cannot be seriously contended that this is not an open question. It would be so even though the decree of divorce had not disposed of the child temporarily. The possibility of changed conditions after such a decree necessarily leaves the custody of children an open question.

No one can read the testimony in this record relating to the habits and disposition of this defendant during the nine months following the rendition of the divorce decree depriving him of the custody of this child without concluding that he is suitable in every way to have its custody and rearing, unless it can be said such showing is overcome by the presumptions against him arising from the decree holding that then he was not suitable to have the child's custody. We think that this showing so clearly overcomes that presumption that the learned trial court was in error in declining to modify the decree as prayed for. We do not mean a modification now made in conformity with these views shall close the question of his suitability to have the custody of the child any more than the decree of divorce closed the question as against him. Should the wife become cured of her present affliction so that it becomes practical for her to enjoy the society of the child it may be that her rights will then call for another change. Or should the defendant become un-

suitable, that may also call for another change. But as conditions existed at the time of this hearing with no one having an inherent legal right to the child other than defendant, and his suitability therefor being shown as we have indicated, we are of the opinion that he should be awarded the custody of the child subject to such changes as subsequent events may dictate. The order of the learned trial court is reversed, with directions to proceed in conformity with this opinion. The defendant will be relieved of the burden of paying allowance to the grandparents except for the period the child remains in their custody. In view of the circumstances of this case the defendant will recover no costs upon this appeal and will pay to the guardian *ad litem* the costs incurred by him upon this appeal including an attorney's fee of \$50.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9846. Department One. December 20, 1911.]

CHARLIE KUEHL *et al.*, *Respondents*, v. F. M. SCOTT *et al.*,
Appellants.¹

VENDOR AND PURCHASER—CONTRACT—RESCISSION BY VENDEE—FRAUD—WIDTH OF STREET. A contract may be rescinded by the vendee where the lot had no means of access except a street, represented by the vendors to be twenty-five feet wide, when in fact it was only fifteen feet, a fact materially affecting its value, and as to which the vendee had no means of readily ascertaining the truth.

SAME—RESCISSION BY VENDEE—WHILE IN DEFAULT. A contract for the sale of land may be rescinded by the vendee for fraudulent representations, if he acts promptly, although he is in default in a payment, where the vendors had not elected to declare a forfeiture or terminated the contract for such default.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 1, 1911, in favor of the

¹Reported in 119 Pac. 742.

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plaintiffs, in an action for rescission, after a trial on the merits. Affirmed.

Sheldon & Jones, for appellants.

Brady & Rummens and *T. B. McMartin*, for respondents.

PARKER, J.—This is an action for rescission of a land purchase contract, and recovery of the amount paid upon the purchase price and the amount expended in improving the land. The plaintiffs rest their right of rescission upon alleged false representations made to them by the defendants as to the location of the north boundary line of the land, and as to the width of the street along that line. From a judgment in favor of the plaintiffs, the defendants have appealed.

On December 1, 1909, appellants entered into a contract with respondents for the sale of a tract of land, in Seattle, fronting 88 feet on the south side of North 70th street, and extending south therefrom 150 feet. The agreed purchase price was \$1,300, of which \$200 was paid in cash, and the balance of \$1,100 was to be paid December 1, 1910, with seven per cent interest, payable semiannually. The contract contained the usual forfeiture clause, by which all rights of respondents as purchasers under the contract should be forfeited, including all sums paid on the purchase price, upon the failure to make payments of principal or interest as therein agreed, "at the election of" appellants. Respondents claim that, prior to entering into the contract and as an inducement to their purchasing the land, appellants represented and stated to them that 70th street, upon which the land fronted, was 25 feet wide, when in fact it is only 15 feet wide. This is the principal false representation involved, and the one upon which the learned trial court rested its decision in respondents' favor, as indicated by its oral decision.

The court made no formal findings. The evidence shows that there is no outlet from the land other than over 70th street; hence, the width of that street materially affects the

value and desirability of the land. This is particularly true when the width of that street is reduced to the very narrow width of 15 feet. At the time of the making of the contract, the street was not improved so as to in any manner indicate its width, and respondents had then no means of readily ascertaining its true width, and had no reason to doubt the representations made to them by appellants. The evidence is not entirely free from conflict touching the nature of the representations as to the width of the street, but a careful review of the entire evidence convinces us that it preponderates in favor of respondents' contentions. We are of the opinion that these facts sustain respondents' claim of rescission of the contract, under our former holdings. *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55.

It is contended in behalf of appellants that respondents were in default in the payment of interest at the time of the commencement of this action, and therefore are not in a position to claim rescission of the contract. In support of this contention, counsel rely upon *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. 781, where the general rule is stated that "a party who is in default will not be allowed to rescind a contract." While that statement of the rule was applicable to that case, it is subject to some qualifications as applied to this case. That case involved an attempt to rescind by the purchaser after default in payments, and after an election by the seller to claim a forfeiture under the terms of the contract. It was, in effect, an attempt to rescind and reclaim the portion of the purchase money paid by the purchaser after all his rights under the contract were at an end. There was in fact no longer any contract to rescind. In this case, there may have been a technical default in payment of the first semiannual interest, though there are circumstances shown in the record rendering even that doubtful; but appellants had not then elected to claim a forfeiture. Indeed, they do not appear to have claimed a forfeiture even yet, so far as this record shows. It is mani-

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fest that the contract was in full force at the time respondents claimed rescission thereof, which was soon after the first semiannual interest became due. This action was commenced in September, 1910, some three months before the deferred payment of \$1,100 on the principal became due. If respondents had the right to rescind because of the false representations of appellants at the time of entering into the contract, they surely were not required to make payments on the contract to keep their rescission right alive, providing they promptly sought rescission upon discovery of the falsity of the appellants' representations, which we think they did in this case. Had appellants sought a forfeiture of respondents' rights under the contract because of the default before rescission was claimed by respondents, the rights of the parties to this controversy might be different, though we express no opinion as to what their rights would then be.

It is unnecessary to notice the other alleged false representations, since the one relating to the width of 70th street we think is sufficiently proven and of sufficient consequence to support the judgment. It is clear that there is no error in the amount of the judgment.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

[No. 9900. Department One. December 20, 1911.]

GEORGE CRITLER, *Respondent*, v. JACOBSON & LINDSTROM,
Appellants.¹

APPEAL—REVIEW—VERDICT. A verdict supported by conflicting evidence, will not be disturbed on appeal, especially when the trial court refused to do so.

VENUE—RESIDENCE OF DEFENDANTS—DETERMINATION. Upon application for a change of venue on the ground that the action is not commenced in the county of the defendant's residence, under Rem. & Bal. Code, §§ 207-209, the plaintiff may controvert the defendant's allegations as to their residence.

APPEAL—RECORD—STATEMENT OF FACTS—EVIDENCE. The decision of the trial court on an issue as to the defendant's residence, on motion for a change of venue, cannot be disturbed on appeal where the evidence on the hearing is not brought up on appeal by bill of exceptions or statement of facts.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered February 2, 1911, upon the verdict of a jury rendered in favor of the plaintiff in an action on contract, after a trial on the merits. Affirmed.

E. E. Wager and *Lee C. Delle*, for appellants.

H. J. Snively, for respondent.

PARKER, J.—This is an action to recover compensation for work performed by the plaintiff in the construction of the roadbed of the Chicago, Milwaukee and Puget Sound Railway. The defendants had contracted to construct a portion of the roadbed, and the plaintiff claims that he performed the work for which he claims compensation at the request of the defendants, upon the portion of the road covered by their contract. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

¹Reported in 119 Pac. 819.

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The principal contention of counsel for appellants is that the evidence was not sufficient to justify the verdict and judgment. A careful reading of the record convinces us that there was ample evidence to support the verdict, both as to the fact of the work being done by respondent at the request of appellants, and as to the amount of the balance due therefor, which are the questions of fact involved. Upon these questions the evidence was in serious conflict. It was such as to prevent our interference with the verdict of the jury, especially in view of learned trial court's refusal to do so, he having seen and heard the several witnesses testify. We deem it unnecessary to review the evidence here.

It is contended that the trial court erred in denying appellants' motion for a change of venue upon the ground that the action had been commenced in the wrong county. The place of residence of the defendants became an issue of fact which the trial court decided against their contention. Learned counsel for appellants seem to proceed upon the theory that, when an application for change of venue under Rem. & Bal. Code, §§ 207-209, is made on the ground that the defendant is a resident of some other county than the one where the action is brought, the plaintiff cannot challenge the truth of the defendant's claimed place of residence. We cannot believe this to be the law. There is nothing in any of these sections making the affidavits or other evidence offered by the defendant as to his place of residence conclusive on that question. That being so, of course such showing may be controverted by the plaintiff.

Counsel for appellants call our attention to the following: *State ex rel. Cummings v. Superior Court*, 5 Wash. 518, 32 Pac. 457, 771; *State ex rel. Allen v. Superior Court*, 9 Wash. 668, 38 Pac. 206; *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783, 63 Am. St. 864, 39 L. R. A. 82. In none of these cases was there any dispute as to the residence of the defendant being in a county other than the one where the action was brought. This question is quite unlike the right

to a change of venue on account of the prejudice of a trial judge, under a statute making the affidavit of the party asking the change conclusive upon that question. The evidence upon which the learned trial court decided this application has not been brought here by statement of fact or bill of exceptions, so we are not able to review that decision. The judgment is affirmed.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 10008. Department One. December 20, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Riekele
Zylstra et al., Plaintiff, v. C. W. CLAUSEN, State
Auditor, Defendant.*¹

SCHOOLS AND SCHOOL DISTRICTS — INDEBTEDNESS — LIMITATIONS. Where two school districts are each indebted in excess of two per cent of their taxable property as shown by the last assessment, and are consolidated and the consolidated district issues bonds in excess of three per cent of its taxable property, the issue is void, as being in excess of the constitutional limitation of five per cent of the taxable property in the consolidated district, as each district, under Rem. & Bal. Code, § 4446, is subject to taxation as a separate entity for the purpose of paying its prior indebtedness.

MANDAMUS—WHEN LIES—TO STATE OFFICERS—SCHOOL BONDS—VALIDITY. Where bonds issued by a school district in excess of the constitutional limit of indebtedness were purchased by the state officers empowered to invest the school fund, mandamus will not lie to compel the state auditor to issue a warrant for such portion of the bonds as would fall within the constitutional limit, the bonds being void and attacked prior to acceptance of the issue; there being in such case no question of estoppel or good faith.

Application filed in the supreme court November 14, 1911, for a writ of mandate to compel the state auditor to issue a warrant for school bonds sold to the state. Denied.

¹Reported in 119 Pac. 797.

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Opinion Per FULLERTON, J.

James Zylstra, for plaintiff.

The Attorney General and *R. E. Campbell*, Assistant, for defendant.

FULLERTON, J.—On August 13, 1910, pursuant to the statutes authorizing the consolidation of school districts, consolidated school district No. 201, of Island county, was duly organized by the consolidation of former school districts Nos. 3, 6, 7 and 15. On June 21, 1911, an election was held in the consolidated district, whereat it was determined to issue negotiable coupon bonds in the sum of \$11,000, for the purpose of building and equipping a school building for the use of the consolidated district. Thereafter the bonds were executed and duly offered for sale, when the state of Washington, acting through its officers authorized to invest the irreducible school fund, became the highest bidder for the same. The bid of the state was accepted and the bonds tendered to the state auditor on behalf of the state. The auditor submitted them to the attorney general for an opinion as to their regularity and validity, and acting on his advice refused to accept or draw a warrant for the same on the ground that the issue was illegal. This is a proceeding in mandamus to compel the auditor to accept the bonds, and issue his warrant in payment thereof.

The record discloses that if the bonds tendered the auditor were issued, their issuance would create an indebtedness on behalf of the consolidated district slightly in excess of three per centum of the taxable property therein, as shown by the last assessment for state and county purposes. It appears, also, that districts Nos. 6 and 7 had an indebtedness at the time of their consolidation exceeding two per centum of the taxable property therein, as shown by the last assessment for state and county purposes. As each member of the consolidated district retains its corporate existence for the purpose of paying its prior indebtedness, and

is subject to taxation therefor as a separate entity (Rem. & Bal. Code, § 4446), it is plain that the issuance of the bond in question will create an indebtedness over this portion of the consolidated district exceeding the constitutional limitation of five per centum. It is for this reason that the auditor was advised to refuse to accept the bonds.

The relators argue that the consolidation of several school districts is the creation of a new entity in nowise affected by the entities of which it is composed, and that its limitation of indebtedness is to be measured by the assessed value of the taxable property within its boundaries, regardless of the amount of indebtedness the entities of which it is composed had formerly incurred for like purposes. But this contention seems to us untenable. It is manifest that the constitution intended to limit the amount of indebtedness any particular territory could incur for school purposes to five per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of the indebtedness. To hold with the relators' contention would be to do away with the limitation entirely, as the legislature, by providing for successive reincorporations of the same territory, could create a new limitation whenever the existing limitation should be reached.

The relator contends further that the bonds are void only for the excess over and above the limitation of five per centum of the taxable property affected, and that the auditor ought to be compelled to accept and pay for so much of them as the district could lawfully issue. But we think this contention likewise untenable. It may be that had the state purchased the bonds and the district had sought to avoid them by showing that they were issued in excess of the constitutional limitation, we would, on equitable principles, allow the contention only for the excess of the issue. But where the attack is made in advance of the issue, another question is presented. No principle of estoppel, good faith,

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or good morals enters into it. The question is one of law simply, and since the attempted issue is contrary to law, the state should not be compelled to accept any part of it.

The writ will be denied.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9785. Department Two. December 20, 1911.]

In re FIFTH AVENUE AND FIFTH AVENUE SOUTH, SEATTLE.
METROPOLITAN BUILDING COMPANY *et al.*, *Appellants*, v.
THE CITY OF SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REVIEW. An assessment of special benefits, while a subject for judicial inquiry, will not be set aside on appeal as excessive, unless the evidence so preponderates as to indicate arbitrary action.

SAME—PROPERTY LIABLE—SPECIAL BENEFITS—POWER OF COURT. Under Rem. & Bal. Code, §§ 7790, 7795, 7796, property can only be assessed if specially benefited, and it is not proper to include in an assessment district property that receives merely a general benefit.

SAME—ASSESSMENT ROLL—SPECIAL BENEFITS—EVIDENCE—PRESUMPTIONS. An assessment roll returned by commissioners is admissible as evidence of the benefits received, and that property outside the district was not specially benefited, and overcomes the *prima facie* showing made by a reassessment arbitrarily ordered by the court.

SAME—EVIDENCE—SUFFICIENCY. The unanimous opinion of commissioners that property should be excluded from an assessment district because not specially benefited, is conclusive on the courts, where it appears that the improvement was to gain easier grades and divert travel from the property in question, which was on higher ground and beyond the influence of the special benefits contemplated.

SAME—APPORTIONMENT OF PUBLIC AND PRIVATE BENEFITS—POWERS OF COUNCIL AND COMMISSIONERS—APPEAL—REVIEW. Under Rem. & Bal. Code, §§ 7786, 7787, authorizing the city council to determine whether an improvement shall be made wholly or partly at the expense of abutting property, and § 7790, authorizing commissioners to apportion benefits between the city and abutting owners by a comparison of the public and private benefits to be derived from the

¹Reported in 119 Pac. 852.

improvement, it is within the power of the council to make the apportionment, and for the commissioners to act only when the council fails to do so; and in any event, the benefit to the public must be a special and not a general benefit, and findings of the court or commissioners are conclusive on appeal.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 25, 1911, confirming an assessment for street improvements, after a hearing before the court. Affirmed in part and reversed in part.

Douglas, Lane & Douglas, for appellant Metropolitan Building Company.

Bausman & Kelleher, for appellant Sisters of Charity etc.

Scott Calhoun and *William B. Allison*, for respondent.

CHADWICK, J.—This suit involved the reassessment of property within the Fifth avenue and Fifth avenue south regrade projects, in the city of Seattle, and is brought here on the appeal of the Metropolitan Building Association and the Sisters of Charity of the House of Providence. These appeals are taken from an order of the superior court confirming a reassessment made under order and direction of the court, and inasmuch as they involve different propositions, will have to be discussed separately.

Considering first the case of the building association, the north boundary of the assessment district as first fixed by the commissioners was at the south boundary of the first lot south of Seneca street, that point being, as we take it from the record, one block north of the point where work was actually done on the avenue. The property of the appellant abutting on Fifth avenue and contiguous thereto being north of Seneca street was not assessed for benefits. The court refused to confirm this roll, and it was vacated with directions to bring back another roll. Under the reassessment, the limit of the assessment district was extended north to a point slightly beyond Union street and the prop-

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erty of the building association was assessed at \$1,544.40. It is contended that the reassessment was made under the arbitrary direction of the court, and against the judgment of the commissioners. It is said that the trial court followed and was controlled in his judgment by the case of *Spokane v. Gilbert*, 61 Wash. 361, 112 Pac. 380. That case defines and limits the procedure in this class of cases, and after quoting pertinent statutes, Rem. & Bal. Code, §§ 7790, 7795, 7796, says:

"These statutes clearly give the court power to adjust the assessment between the city and the property owner, so that each one may pay the proportionate share of the cost of the improvement. The court is not bound by the assessment made by the commissioners. In *In re Pike Street*, 42 Wash. 551, 85 Pac. 45, we said: 'The statute give the court power to modify, change, alter, or annul the assessment, and we think it may lawfully find that an improvement is of sufficient general benefit to make a proportion of the cost a general charge against the municipality.' In order to do this, the court must necessarily hear and consider evidence bearing upon such question."

But we do not understand that it was there held that property that was not in fact specially benefited should be assessed, but rather that the amount to be assessed against property within the district and proper to be assessed was an appropriate subject of judicial inquiry; and following a long line of cases, the judgment of the court would not be disturbed or modified unless the evidence so preponderated against the judgment as to indicate an arbitrary disposition on the part of the commissioners or the court. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *In re Seattle*, 46 Wash. 63, 89 Pac. 156; *In re Western Avenue*, 47 Wash. 42, 91 Pac. 548; *Seattle v. Felt*, 50 Wash. 323, 97 Pac. 226; *In re Seattle*, 50 Wash. 402, 97 Pac. 444; *In re Pine Street*, 57 Wash. 178, 106 Pac. 755.

But here we are confronted with a question not heretofore decided by this court. Can the court include in its judg-

ment of confirmation property which is not abutting or contiguous to the improvement, and is shown to be beyond the zone of benefit contemplated by the plan? Without holding that it cannot be done—for questions depending upon facts cannot be stated as hard and fast rules of law—we think that the showing here made is not sufficient to sustain the order of confirmation. It will be obvious to any one who reads the special assessment statutes that it was the intent of the legislature to permit the assessment of only such property as was specially benefited (§ 7790), and that general benefits could not be made the basis of a levy. So that §§ 7795 and 7796, quoted in *Spokane v. Gilbert*, *supra*, must be read with this thought in mind. When so read, it will be seen that it is the duty of the court to inquire whether the property is assessed more or less than it is specially benefited, and unless there is a special benefit the court has no jurisdiction to order its inclusion in the roll. The first roll returned by the commissioners is, in itself, proper to be considered as evidence of the judgment of the commissioners, as well as of the fact that the improvement did not embrace the property of the appellants within the zone of property specially benefited, and is sufficient to countervail the *prima facie* showing which has been held to be made out by the roll under present consideration. *Elma v. Carney*, 4 Wash. 418, 30 Pac. 732; *Seattle v. Smith*, 8 Wash. 387, 36 Pac. 280; *Hamilton v. Chopard*, 9 Wash. 352, 37 Pac. 472.

We come, therefore, to an examination of the testimony. It will be borne in mind that the first roll did not involve the property sought to be charged; and that the court, for the reason that he thought the district was too small or did not include enough territory, ordered a reassessment. A new roll being brought in, a hearing was had. The record shows that the highest point on Fifth avenue is Madison street, and that traffic originating and landing in the territory north of Madison street on Fifth avenue would naturally follow the easier grades to the west, and be carried

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over Third and Fourth avenues. It would seem that the point fixed by the first roll as the north limit of the district was a natural dividing point. Mr. Foster, one of the commissioners, testified as follows:

"Q. What was your reason for not crossing [Seneca street] before? A. At that time we felt that the fact that Seneca street offered an accessible grade from Fifth to Fourth avenues, that there existed at that point a diverting influence by reason of that accessible grade between Fifth and Fourth, giving the properties north of Seneca street on Fifth avenue easy access to Fourth avenue and, consequently, we thought that, by reason of that diverting influence, that would be the reasonable place and the logical place in which to fix the limit of the district. Q. And that reason still obtains, does it not? A. Oh, yes, our deliberations have not changed the grades on Seneca street. Q. And traffic will still continue to go down Seneca street instead of going up a grade to Madison and over Fifth; that is your opinion, is it not? A. I take it that much of it will. Q. Yes. A. In other words, I think that the property to the north of Seneca street is not as dependent upon the bettered condition of Fifth avenue as the property to the south of Seneca street."

Mr. Merrifield, another one of the commissioners, testified as follows:

"Q. Then, the present assessment roll is not in your own opinion a fair and equitable one? A. If I had the making of it alone, no. I believe the first roll is the better roll of the two, the way I look at it. . . . Q. This roll does not carry out the suggestions or instructions of the court at the hearing upon the last roll in so far as the extension of the district and the further spreading out and sloping off of the assessment, does it? A. Well, we aimed to, yes, according to the instructions of the court, we aimed to. I was not here myself. I was excluded from the court room on that hearing. . . . A. My opinion, as I stated before, is that I don't think that the property at the extreme north end of this improvement is benefited. I do not believe that they are especially benefited. Q. How about the lots on Fifth avenue north of Madison street; there is no change

in the grade on these lots, is there? A. No, sir. Q. There the value of property is determined almost exclusively on its access to the shopping and retail business district immediately to the west and to the north; isn't that so? A. Yes, sir. . . . Q. In your opinion did not all the benefits cease; I mean all the benefits for this improvement cease at the place where you terminated your previous roll? A. Well, that is my opinion. They might not cease but I thought they did. Q. You still think so, don't you? A. Yes, sir."

The other commissioner, Mr. Goodhue, said:

"A. I think, if your honor pleases, that the benefits should be confined to the abutting property on the southern end of the district. . . . I don't believe as a commissioner that such a congestion exists at present and if it did, Fifth avenue with its grade much heavier than Fourth and other streets to the west, would not be used except on cases of extreme necessity for the reason that any teamster hauling a load will probably seek, even if he has to go around a little further, seek the better grade where it is materially better. If it had been intended to make Fifth avenue an important north and south thoroughfare, I think it would have to have been included with a widening to make it susceptible of heavy traffic. . . . Well, I believe that the grade even after the improvement is perfected will be still so much heavier than the parallel streets that it will not be used except in cases of necessity and that would mean a considerable growth of the city beyond its present size."

Counsel for respondent insists that some of this testimony was taken without special reference to the case of the appellants, but it nevertheless goes to show that the judgment of the commissioners sustains the first, rather than the second, roll. It has been held that § 22, Laws of 1905, page 84, did not make a commissioner of the superior judge, or permit a substitution of his judgment upon questions of fact, but that his power was limited to the appointment of the commissioners and a judicial review of the assessment roll returned by them. *Seattle v. Seattle & Montana R. Co.*, 50 Wash. 132, 96 Pac. 958. This holding was made under

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an act which provided that the superior judge should examine the locality and otherwise act as a commissioner. This power was eliminated in the later statutes so as to make them harmonize with this ruling.

Considering, then, the record as we have it before us, we think it has been clearly shown, and for sufficient reasons as disclosed by the commissioners when called as witnesses, that the reassessment does not voice either their better or their true judgment, but that it was made to meet the desire, if not the command, of the court. This case is not unlike *In re Everett*, 61 Wash. 493, 112 Pac. 658, where the assessment was directed by the court. After copious quotation from the record we there said:

"Assessment according to benefits is largely a matter of opinion, and while we have often refused to disturb assessments where there was a conflict in the testimony as to the character and extent of the benefits, and have held the assessment roll as handed in by the commissioners and confirmed by the court was conclusive in the absence of fraud or apparent mistake, we have likewise held it will not be so regarded when it appears to have been arbitrarily made, such an assessment being a manifest abuse of the discretion vested in the commissioners. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279."

While we there referred to the remarks of the trial judge as indicating a lack of judicial discretion, the testimony of the commissioners, taken as a whole, convinces us that in this case there was no room for the exercise of judicial discretion. We are reminded that we said, in *In re Pine Street*, *supra*, and in *In re Seattle*, 50 Wash. 402, 97 Pac. 444, that a special assessment will not be disturbed as unequal or unjust where it rests upon opinion and the evidence is conflicting. We reaffirm the doctrine of those cases, but this case is not like unto them. It is not the equalness or justness of the assessment that is here involved, but the right to assess at all. And while all of these matters rest largely in opinion, and if there be a conflict of opinion appellate courts

will not intervene to substitute their own judgment, yet after all the property owner is entitled to the judgment "of those whom the law has charged with the duty of establishing the district and apportioning the cost," (*In re Seattle, supra*) without judicial interference when that judgment is undivided.

In this case, there is no conflict of opinion. It is certain and, being ascertained, must be held to be controlling, not only upon the superior court but this court as well. Other suggestions are made by appellants which might be sufficient to warrant a reversal of this case; but the determination of them will be reserved by the court until such time as it is necessary to decide them.

We are asked to intervene on behalf of the Sisters of Charity. The first proposition urged is that chapter 153, Laws 1907, p. 316 (Rem. & Bal. Code, § 7768 *et seq.*), as amended by Laws 1909, chap. 211, p. 724, provides in §§ 19 and 20 (Rem. & Bal. Code, §§ 7786, 7787), that the council may determine whether all or, if not all, what portion of the sums necessary to pay compensation and damages shall be raised by assessment on the property specially benefited, and that the later section 23, Laws 1909, chapter 211, p. 724 (Rem. & Bal. Code, § 7790), provides that the commissioners shall determine by a comparison of the public and private benefits to be derived from the proposed improvement what proportion of the cost shall be borne by the city and what proportion shall be borne by the property specially benefited. It is said that it is of the essence of the whole statute to provide who shall apportion and assess the burden of expense; that clearly the question cannot be determined by both tribunals; The question put by appellant is not without its vexations, but we think no violence is done to legal principles in holding that it is within the power of the council to make the apportionment; but that, if it does not do so, that duty falls upon the commissioners; in other words, that the right of the commissioners to act at all in this behalf depends upon

the inaction of the council. In any event the roll comes into the superior court for confirmation, and being passed upon judicially, we are not willing to hold that there has been any violation of legal rights or a denial of due process of law.

But it is said that the evidence shows that there was in fact a benefit to the general public, so that there was no discretion left, either in the commissioners or the court, to do anything other than to apportion the cost. The commissioners say that there was no benefit, and then admit, upon more searching examination, that there is or may be a benefit to the general public. No questions come to this or any other court that involve such entanglements and complications as do these assessment cases. They cannot be resolved by reference to equation or theorem. As one of the commissioners said in this case, "the damages or benefits cannot be figured out;" "it is a matter of judgment." *In re Pine Street, supra*. "Justice in its abstract sense is impossible," said the trial judge, and we admit that it can hardly be approximated. All we can hope for then is that, in confirming these rolls, no greater injustice is done to one than to another. But it does not follow that the law is not satisfied. A benefit in a general way accrues to a municipality in virtue of every improvement. But the improvement may not be of such special character as to invoke the equitable power of the court in distributing its cost.

Section 7790, Rem. & Bal. Code:

"It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made and the property which will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be a benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion. . . ."

seems to imply that the benefit referred to is a special

benefit and not a general one. It would seem further that, if this were not so, the statute under which assessment districts are formed, and which implies that the property within the district shall meet the cost of the improvement, served no purpose; for it would have been enough to say that the abutting property, in whole or in part, should sustain the charge. In *In re Pine Street, supra*, one of the contentions was that a "just proportion of the cost was not assessed against the general fund, such improvement being largely for the benefit of the public generally." While the point was only suggested in the briefs, the court held that the whole improvement could have been made at the expense of the property specially benefited. The court said:

"It is true that only a small part of the total cost of the improvement was finally assessed against the general fund, but, so far as the record shows, there was no obligation to assess the general fund at all. The whole improvement, notwithstanding, might have been made at the expense of the property specially benefited, without reference to the general benefits."

We see in this case, not so much the possible deprivation of a right, as a want of a remedy. If the case were sent back, the return of the commissioners would no doubt bring the same result; for it is not within our power to substitute our judgment for, or coerce, the opinion of the commissioners, unless it has been arbitrarily exercised. They have found that there is no such benefit to the public as will warrant a tax upon the general fund. Their findings and return of the fact conclude us.

The appeal of the Metropolitan Building Association is sustained, and this case will be remanded with directions to dismiss it from this proceeding, with its property exonerated from any charge for the improvement of Fifth avenue south of the first lot south of Seneca street. The judgment of the lower court as to the property of the Sisters of Charity of the House of Providence is affirmed.

DUNBAR, C. J., CROW, ELLIS, and MORRIS, JJ., concur.

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[No. 9407. Department Two. December 21, 1911.]

EVAN WILES, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Appellant*.¹

TRIAL—EXAMINATION OF WITNESSES—EXCLUSION OF WITNESSES. It is not an abuse of discretion to grant plaintiff's request for the exclusion of defendant's witnesses, where it was indicated that a like request by defendant would have been granted if it had been made.

APPEAL—REVIEW—VERDICT. Where there is competent and substantial evidence to sustain plaintiff's case, its weight and sufficiency is for the jury.

CARRIERS—EJECTION OF PASSENGER—DAMAGES—EXEMPLARY DAMAGES—HUMILIATION—INSTRUCTIONS. In an action for wrongful ejection of an intoxicated passenger from a train, instructions allowing damages for mental suffering and humiliation, without distinguishing between rightful and wrongful ejection, are not prejudicially erroneous, where other instructions properly limited the recovery for a rightful ejection to damages unnecessarily inflicted, and another instruction correctly stated the elements for a rightful and wrongful ejection, and the instructions as a whole defined the duties and rights of the parties.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence is properly denied, where it was based upon hearsay as to what two witnesses would testify to, and their affidavits were not produced, and no diligence in securing the evidence was shown.

APPEAL—REVIEW—MISCONDUCT OF JUDGE. Language of the judge calculated to prejudice the jury is not ground for a reversal where the record shows it was not in the presence of the jury.

NEW TRIAL—MISCONDUCT OF JURY—IMPEACHING VERDICT. A quotient verdict will not be set aside as arrived at by lot or chance, where it was not shown that there was an agreement to abide by the result, and there was no attempt to make the impeachment of the verdict complete.

CARRIERS—EJECTION—DAMAGES—EXCESSIVE VERDICT. A verdict for \$523.93 for the wrongful ejection of a passenger from a train is excessive, and should be reduced to \$300, where plaintiff suffered but slight rheumatism from exposure, and his loss of time and expenses did not entail a loss exceeding \$200.

¹Reported in 119 Pac. 810.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, for \$523.95 damages for the wrongful expulsion of a passenger from a railway car. Affirmed on condition of remitting \$223.95.

C. H. Winders, for appellant.

M. J. McGuinness and *Robert McMurchie*, for respondent.

ELLIS, J.—Action to recover damages for an alleged wrongful ejection of respondent from a passenger train of appellant on December 1, 1909. The jury returned a verdict in respondent's favor for \$523.95. Appellant's motion for new trial was overruled, and a judgment for that amount was entered against the appellant. From that judgment, this appeal was prosecuted.

It is conceded that the respondent was a passenger on the train in question and had paid his fare in full for carriage from Snohomish to Maltby, and that he was ejected from the train by the conductor and brakeman before the train had reached Maltby. By a careful examination of the evidence we are satisfied that on every other material question of fact there was a substantial, and in the main, a sharp conflict in the evidence. If, therefore, the case was submitted to the jury upon proper instructions, the verdict is conclusive of the facts. It was practically admitted by counsel in argument that there was such conflict in the evidence as to require its submission to the jury, but it is urged that the appellant did not have a fair trial for reasons as follows: (1) Error of the court placing appellant's witnesses under the rule of exclusion after respondent's evidence in chief was in; (2) error in denying appellant's challenge to the sufficiency of the evidence; (3) error in giving certain instructions and in refusing to give others requested; (4) error in overruling appellant's motion for a new trial.

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(1) Counsel contends that the trial court abused its discretion in permitting attorney for respondent, in the presence of the jury, to demand that "the railroad's witnesses be excluded." The record, however, shows that the request was not couched in these, or other, objectionable terms. It was as follows: "At this time, the plaintiff asks that the witnesses for the defendant be put under the rule." The request was granted, and upon counsel for appellant objecting to the order, the court stated: "I have made it my universal custom to enforce the rule whenever asked." The court's remark indicated to the jury that if the same request had been made as to respondent's witnesses it would have been granted. The placing of witnesses under the rule is a matter within the discretion of the trial court. 21 Ency. Plead. & Prac., p. 983. While it is doubtless the better practice not to enforce the rule except on seasonable application, we cannot say, in view of the reason given by the court, that there was such an abuse of discretion as could have been prejudicial to the appellant.

(2) When all of the evidence was in, the appellant challenged its sufficiency to sustain any verdict for respondent. The rule on such a motion is the same as that upon a motion for nonsuit. Where there is competent and substantial evidence to sustain the plaintiff's cause its credibility and sufficiency are for the jury. The motion was properly denied. *Spokane & Idaho Lum. Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; *Brookman v. State Insurance Co.*, 18 Wash. 308, 51 Pac. 395; *Rinear v. Skinner*, 20 Wash. 541, 56 Pac. 24; 38 Cyc. 1565 *et seq.*

(3) The evidence was sharply conflicting as to whether or not the respondent was offensively drunk, and as to whether, prior to the ejection, he used profane and obscene language, thus forfeiting his rights as a passenger. It was also in direct conflict as to whether he was ejected in a swamp where the water came up to the railroad track, so that he either fell or was thrown into water about six feet

deep, or whether the expulsion took place at a point known as Fiddler's Bluff where the ground was dry. The appellant urged that the instructions contain fatal error as to the elements of damage in view of this evidence. Since the instructions must be construed together in order to determine their reasonable effect, we quote from those applicable to this phase of the case rather fully, lettering them for convenience, as follows:

"(a) While the railroad company has a right to eject intoxicated, boisterous or disorderly persons from its train, such ejection must be done in a reasonable manner, at a proper time and place, and considering his condition, without exposing him to harm or imperiling his life, and if you should find from the evidence in this case that, at the point where the plaintiff was ejected from the train of the defendant, if he was ejected, the ground was submerged with flood waters, and that plaintiff was thrown by defendant into water approximately six feet in depth, then I instruct you that the plaintiff, whether wrongfully ejected or not, is entitled to recover whatever damages he may have sustained by reason of having been thrown into the water, if he was thrown into the water, by the agents of the defendant.

"(b) You are further instructed that if you find, under the instructions heretofore given you, that the plaintiff was guilty of such disorderly and lawless behavior, upon the car in which he was travelling, as to justify the conductor in ejecting him, and that he was ejected at a place, although away from a station, where he could reasonably take care of himself, that then the defendant company would not be liable to him for any injuries that he sustained at any subsequent time endeavoring to reach his point of destination or in attempting to return to Snohomish.

"(c) The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury; that is to say, you should apply them as a whole to the facts, that is, consider all of the instructions together as they may relate to the facts as shown by the evidence.

"(d) If you should find, under the evidence and the rules of law given to you, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages

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which, in your judgment, he should recover. In estimating this amount, you may take into consideration any expenses actually incurred, the loss of time occasioned by the immediate effect of the injuries, and the physical and mental suffering caused by the injuries. You may, in this respect, consider what, if any, compensation shall be allowed to the plaintiff for the humiliation, shame and disgrace from having been ejected from the train of the defendant, if such was done.

“(e) The court instructs the jury that, if they find from the evidence that the defendant carrier was guilty of wrongfully ejecting the plaintiff from its train of cars, that the plaintiff is not limited in his recovery to the actual money lost by him by reason of such ejection, but he may recover damages for the humiliation and mental suffering which such ejection may have caused him.”

The appellant contends that the last two of the instructions above quoted authorized the jury to allow compensation for respondent's humiliation, shame, and disgrace, even if he was rightfully ejected from the train. We cannot so read them in connection with the context. The first quoted instruction (a), by a fair interpretation, limits the recovery in case of rightful ejection to whatever damages he sustained by reason of having been thrown into the water. This is especially apparent when read in connection with instruction lettered (b), which plainly eliminates every injury consequent upon a rightful ejection, saving only by implication such as may have been unnecessarily inflicted at the time. The last quoted instruction (e), refers only to a wrongful ejection and cannot by any reasonable construction be applied to anything else. Instruction (d) is manifestly intended to cover the matter of damages generally without segregation as to rightful or wrongful ejection. It closes with faulty language in not limiting recovery for humiliation to a wrongful ejection only, but it was not reasonably calculated to mislead the jury, in view of the two instructions (a) and (e), which separately stated correctly the elements of damages in case of rightful and wrongful ejection, eliminating

the element of humiliation in the one case and including it in the other. Moreover, in instruction (c) the court warned the jurymen against laying stress upon isolated instructions and cautioned them to consider all of the instructions together as they may relate to the facts.

This court has often held that, though segregated instructions or parts of instructions, when standing alone, may not correctly state the law as applied to the evidence, they will not be held ground for reversal where the instructions taken as a whole do correctly apply the law to the evidence. *Seattle Gas & Elec. L. & M. Co. v. Seattle*, 6 Wash. 101, 32 Pac. 1058; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Wolf v. Hemrich Bros. Brewing Co.*, 28 Wash. 187, 68 Pac. 440.

In *Cheichi v. Northern Pac. R. Co.*, ante p. 36, 118 Pac. 916, the appellant here, as respondent there, successfully invoked this rule where the language complained of, if read alone, was positively erroneous as applied to the evidence.

In other instructions given, the court fairly rang the changes, repeating again and again that a railway company "has a right," and "it is its duty towards the public," and "it is a duty which the law imposes," and "a duty owing to the other passengers" to expel a disorderly passenger, and even to eject him in anticipation of disorder without waiting for any overt act. The jury was told not to weigh with too great nicety the degree of force applied, and that if the plaintiff was conducting himself in a disorderly manner the conductor had the right to eject him at any reasonably safe place, using only such force as was reasonably necessary. In view of these instructions, and those quoted, it is manifest that the error complained of could not have been prejudicial.

We have examined the instructions requested by the appellant the refusal to give which is assigned as error. We find that one of them was actually given by the court [See quoted instruction (b)], and the others so far as correct were amply covered by the instructions given.

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(4) The affidavit of counsel for appellant in support of the motion for new trial stated, on hearsay in each instance, that two women who were in the car would testify to the respondent's having used boisterous language before his expulsion and that he was ejected at Fiddler's Bluff. Their affidavits were not produced, nor even the affidavits of the persons who told counsel the women would so testify. There was no sufficient showing of diligence to secure this evidence at the trial, and in any event the proffered evidence would be merely cumulative.

The affidavits also advert to what seems to have been a rather earnest argument between court and counsel on appellant's challenge to the evidence. The record shows that this was not in the presence of the jury, but it is argued that certain language used by the court indicates prejudice which, in some manner, may have reached the jury. We can assume nothing of this kind on mere innuendo or suspicion of counsel. No such bias is discernible either in the court's instructions or in his rulings on admission of evidence. If we seriously entertained a showing of this kind, we would spend much of our time trying courts rather than causes.

The affidavits of two jurors were produced, one stating generally that the verdict was arrived at by chance and lot without any specification as to what was done, the other stating, "That said verdict was arrived at by lot and chance, and that the several sums of money was voted by said jury, and then by process of division of the several sums so put down by the said members of the jury, by the mathematical process, the said sum of \$523.93, the said verdict, was arrived at."

There was no statement that the jurors had agreed in advance to abide by the result. Such an agreement is the very essence of the misconduct charged. The burden of showing all the essential elements of the misconduct charged was upon the appellant. This court has often held that the taking of

a quotient is not in itself misconduct, unless it appears that the jury had agreed in advance to be bound by it; even though the verdict returned be exactly or nearly the amount of the quotient. *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596; *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. 841; *Bell v. Butler*, 34 Wash. 131, 75 Pac. 130; *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. 899. In most jurisdictions a juror will not be permitted to impeach his own verdict, and while it is permitted by statute in this state, such an impeachment must be complete and conveyed in no uncertain terms.

It is also contended that the judgment is excessive, and under the evidence we think this contention well founded. Respondent's testimony shows that, as a result of being thrown into the water and the exposure thereafter, he suffered from rheumatism for about two months. It is manifest, however, that his indisposition was slight. He did not deem it necessary to consult a physician, but did take some medicine and a number of turkish baths. He testified that his actual expenses were about \$25, and that when at work he had been earning about \$4 a day. His loss of time and actual expenses could not much exceed \$200. It seems plain that the jury was influenced by passion or prejudice. Under the evidence, we think that \$300 would be an ample recovery.

The cause is remanded with direction to vacate the judgment on return of the remittitur; and if respondent, within twenty days, in writing remit from the verdict the sum of \$223.95, the court shall enter judgment for \$300. Otherwise a new trial shall be granted. The appellant will recover its costs in this court.

DUNBAR, C. J., CROW, and CHADWICK, JJ., concur.

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Opinion Per MORRIS, J.

[No. 9808. Department Two. December 22, 1911.]

ELLEN TITUS, Respondent, v. F. L. TITUS, Appellant.¹

EVIDENCE—PAROL—TO EXPLAIN WRITING—ADMISSIBILITY. Parol evidence is admissible to explain the intent and purpose of the parties in making interlineations and material alterations in a written contract prior to its execution, even though it contradicts the written contract.

HUSBAND AND WIFE—SEPARATION AGREEMENT—CONSTRUCTION. A separation agreement, whereby the husband agreed to pay the wife \$3,000 in monthly installments for the support, maintenance and education of their two children upon condition that the children be kept in school and continue their education during said period, and in the event of their failing to continue their attendance at school, the payments to cease, should be construed to require attendance at school only until their education, as contemplated by the parties at the time, is completed; and where they graduated from college before the end of the period, the wife is entitled to recover the whole sum, without further attendance in school by the children.

Appeal from a judgment of the superior court for Whitman county, Neill, J., entered January 14, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Merritt, Oswald & Merritt, for appellant.

John M. Gleeson and Joseph F. Morton, for respondent.

MORRIS, J.—On June 21, 1904, the parties hereto were husband and wife. Differences having arisen between them on account of which they sought to sever all conjugal relations, they entered into a contract in settlement of all their property rights. They had two children, Stanley H., then twenty years of age, and Marguerite E., then eighteen years of age, who were then attending school at Washington, D. C. These children were to be left in the custody of the mother, and it was desired to provide for their education and main-

¹Reported in 119 Pac. 813.

tenance. For this purpose a stipulation was inserted in the contract as follows:

"It is further stipulated and agreed that said party of the first part shall pay to said party of the second part the sum of \$75 on the 1st day of August, 1904, and on the first day of each succeeding month thereafter for a period of three years and four months to be used for the support, maintenance and education of Stanley H. Titus and Marguerite E. Titus, said sum to be paid upon the condition that said children be kept in school and continue their education during said period, and in the event of either of said children failing to continue their attendance at school said payment shall become, after such discontinuance, \$37.50 per month, and in the event that both of said children should discontinue their attendance at school said payment shall cease."

As originally prepared, the contract provided these payments should commence on the 1st day of October, 1904, and continue for three years. Respondent objected to signing the contract as thus reading, contending that the agreement between herself and appellant was that she should receive \$3,000, while the contract as prepared only provided for a payment of \$2,700. Appellant, on being interrogated by his attorney as to this understanding, replied, "Give it to her;" and accordingly, to save drawing up a new contract, it was thought sufficient to effect the change by crossing out the word "October" and inserting the word "August," and interlining after the words "three years," the words "and four months;" as a payment of \$75 per month for three years and four months would aggregate the sum of \$3,000. The children continued in school until their graduation in June, 1907. Appellant continued his payments of \$75 per month until he had paid \$2,700, when he ceased. Respondent subsequently brought this action to recover the balance of \$300, and having so recovered, appellant brings the judgment here for review.

The defense was that the contract only provided for the monthly payments while the children were attending school,

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and that, having finished their attendance, appellant was thereby absolved from making further payments; respondent's contention being that the contract called for a payment of \$3,000, provided the children remained in school until their education was completed. The main contention of error is that evidence of the conversation as to the purpose and effect of the contract was inadmissible. Ordinarily such a contention would be well founded, as it is now too late to deny the rule that parol evidence is not admissible to vary, contradict, or explain the terms of a written contract. Such rule, however, has its limitations and exceptions, as well established as the rule itself, and one of these exceptions is that parol evidence is admissible to explain interlineations and material alterations in a written contract when made prior to its execution. *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Crawford v. Brady*, 35 Ga. 184; *Bowe v. Dotterer*, 80 Ga. 50, 4 S. E. 253; *Johnson v. Pollock*, 58 Ill. 181; *Neil v. Case & Co.*, 25 Kan. 510, 37 Am. Rep. 259; *Bernstein v. Ricks*, 20 La. Ann. 409. It was therefore not error to admit evidence of the purpose of the alteration of "October" to "August," and the interlineation and addition of the words "and four months."

It would avail appellant nothing if such rule were not applicable here, as the interpretation of the contract, when plain and unambiguous, being a question of law for the determination of the court, the same result would follow, as this contract, when carefully read, can have but one meaning. Its evident purpose and consideration was the education of these two children. For that purpose \$3,000 was to be paid to respondent at the rate of \$75 per month. The only limitation upon this payment was the "children failing to continue their attendance at school," as it is expressed in one instance; in the other, the "children should discontinue their attendance at school." These words of limitation must be read in the light of the evident purpose and consideration of the contract, to provide an education for the children

and to continue to so provide until that education was finished. The limitation or proviso was evidently intended to take effect in case the mother should withdraw the children from school before their education as then planned should be finished. The money was for the benefit of the children, to be spent in their education and maintenance while at school. Should the mother fail in carrying out this consideration as then planned, she could not have this money to devote to her own use. A child's education does not fail, neither does it discontinue, when that education is finished and completed so far as attendance at school is a part of that education. When this boy and girl graduated from their respective colleges, their education was finished within the meaning of the contract, and the mother was entitled to the money the father agreed to pay for that purpose. There had been neither failure nor discontinuance which he had sought to guard against in the contract. It would be folly to assert that the meaning of the contract was that the mother was to continue the children at school until December 1 following their graduation in order to be entitled to the \$3,000. The father knew as well as did the mother that the school year would end not later than June, and that in June, 1907, the education of these children, provided they were kept in school and maintained their standing, would be fully completed; and he must be held to have contracted to pay the \$3,000 with knowledge of such fact. So that, whatever construction be placed upon the contract as to its ambiguity, the result is the same, and appellant has no just cause for complaint.

Judgment affirmed.

DUNBAR, C. J., CHADWICK, ELLIS, and CROW, JJ., concur.

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Opinion Per Curiam.

[No. 9847. Department Two. December 26, 1911.]

JOHN SMITH, *Appellant*, v. JOHN D. PORTER *et al.*,
Respondents.¹

APPEAL—REQUISITES—BOND. An appeal from a judgment for \$23 costs must be dismissed where the bond on appeal, in the sum of \$200, is conditioned also as a supersedeas bond.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered December 10, 1910, upon granting a nonsuit, dismissing an action in tort. Appeal dismissed.

Samuel T. Crane, for appellant.

Cannon, Ferris, Swan & Lally, for respondents.

PER CURIAM.—This is an action for personal injuries. The trial court sustained defendants' motion for a nonsuit, and entered judgment of dismissal with costs which the clerk taxed at \$23. The plaintiff has appealed.

Respondents have moved this court to dismiss the appeal for the reason that the bond in the sum of \$200 is conditioned both as an appeal and supersedeas bond, and is insufficient. In *Hewitt v. Lansdale*, 26 Wash. 615, 67 Pac. 354, the final judgment was one of dismissal with costs taxed at \$58. The appeal bond, in the sum of \$200 conditioned both as an appeal and supersedeas bond, was held insufficient, and the appeal was dismissed. Appellant insists the recitals of the bond herein show it was intended for an appeal bond. That is true, but they do not show it was intended as an appeal bond only. Its conditions show that in form it was also a supersedeas bond drawn in strict compliance with the requirements of Rem. & Bal. Code, § 1722. The bond is insufficient. *Washington Water Power Co. v. Abacus Ass'n*,

¹Reported in 119 Pac. 824.

49 Wash. 261, 94 Pac. 1072; *Hassett v. Fraternal Brotherhood*, 59 Wash. 161, 109 Pac. 305; *Carson v. Bunn*, 59 Wash. 266, 109 Pac. 797.

The appeal is dismissed.

[No. 9685. Department One. December 26, 1911.]

W. H. SANDERSON, *Respondent*, v. A. H. STAY, *Appellant*.¹

BILLS AND NOTES—BONA FIDE PURCHASERS—ACTIONS—DEFENSES—FRAUD. In an action on a note, a verdict for the plaintiff is properly directed where the defense of fraud was supported by but little evidence to impeach it in the hands of the original payee, and none at all in the hands of a *bona fide* purchaser before maturity.

Appeal from a judgment of the superior court for King county, Clifford, J., entered April 13, 1911, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action on contract. Affirmed.

Douglas, Lane & Douglas, for appellant.

William Wray, for respondent.

PER CURIAM.—The respondent brought this action against the appellant to recover upon a promissory note, given by the appellant to one Paul Brockmeier, and by Brockmeier endorsed to the respondent before maturity. The appellant defended on the ground that the note was obtained from him by fraudulent representations made by Brockmeier. He alleged that the note was given as the purchase price of certain shares of stock in a coal mining company, and that he was induced to purchase the stock because of certain representations made by Brockmeier, which he alleges were false and fraudulent; further alleging that the respondent acted in collusion with Brockmeier in the sale of the stock and knew of such false representations at the time he purchased the note. At the conclusion of the evidence offered on

¹Reported in 119 Pac. 1135.

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Statement of Case.

the trial, the court, on the motion of the respondent, directed a verdict in respondent's favor on the ground that the appellant had not established his defense, or rather had offered no evidence to rebut the evidence of the respondent to the effect that he was a holder of the note for value and in due course. The appellant excepted, and brings the case here, contending that the case should have been submitted to the jury

We think the action of the court was justified by the record. It would serve no useful purpose to review the evidence; but as we read it, there is but little to impeach the note were it in the hands of Brockmeier himself, much less is there anything to impeach it in the hands of the respondent who purchased for value and before maturity.

The judgment is affirmed.

[No. 9743. Department One. December 26, 1911.]

ANNA E. MULLINS, *Respondent*, v. PATRICK MULLINS *et al.*,
Appellants.¹

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—ACTIONS—ACCRUAL—LIMITATIONS. An action for alienation of affections of a husband is not commenced within three years from the time of the accrual of the action, and is therefore barred, where the plaintiff separated from her husband more than three years before the action was commenced, and anything said or done by the defendants to alienate the husband's affections occurred prior to that time.

Appeal from a judgment of the superior court for Yakima county, Preble J., entered November 1, 1910, upon the verdict of a jury rendered in favor of the plaintiff in an action for alienation of affections, after a trial on the merits. Reversed.

Englehart & Rigg, for appellants.

Wende & Taylor and *Charles A. Riddle*, for respondent.

¹Reported in 119 Pac. 830.

MOUNT, J.—The plaintiff brought this action against the defendants to recover damages on account of alleged alienation of the affections and loss of consortium of her husband. She recovered a judgment in the court below, and the defendants have appealed.

At the trial of the case, defendants moved the court for a nonsuit at the close of the plaintiff's evidence, and again at the close of all the evidence moved for a directed verdict. These motions were denied. A number of errors are assigned, but our view upon the question hereinafter noticed is conclusive of the case, and we shall therefore not notice the other questions presented.

It is argued by the appellants that the action was barred by the two-year statute of limitations; but, if the three-year statute applies to a case of this kind, that the evidence conclusively shows that the action was not begun within three years after the cause accrued. The respondent concedes that the action was not begun within two years, but it is claimed that the action did not accrue until February 2, 1907, and was therefore well within the three-year statute, which applies to this case. It is not necessary to decide which statute applies, for we are clear that the action was not commenced until after the expiration of three years from the time it accrued.

The plaintiff and John R. Mullins were married in Butte, Montana, on November 28, 1905. John R. Mullins was the son of the defendants. After the marriage, and on April 10, 1906, the plaintiff and her husband came from Butte to North Yakima, to make their home with the defendants. The plaintiff at that time was pregnant. They lived with the defendants at their home until some time in June, 1906, when the two families moved into a new hotel constructed and owned by the defendants. The son, John R., was employed in the management of the hotel. In August, 1906, the plaintiff's mother, who then lived in St. Paul, Minnesota, was invited by the plaintiff and her husband to come

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to North Yakima to take care of her daughter during childbirth and confinement. She arrived on August 18, 1906. A child was born to the plaintiff in September. After the arrival of the plaintiff's mother at Yakima, the families were not harmonious. It is also apparent that prior to that time the relations were not altogether harmonious between the two Mullins families; for the plaintiff testified that her mother-in-law had frequently said to plaintiff's husband that plaintiff "was only a common working girl, not good enough for Johnny; was not in his class, and they would never live together if she could help it," and such like expressions.

After the baby came, and some time in October, 1906, plaintiff and Mrs. Mullins, her mother-in-law, had some difficulty, and plaintiff slapped Mrs. Mullins in the face. Thereupon the defendant Patrick Mullins told plaintiff she would have to go. She thereupon had her clothes packed and she and her mother, on November 3, 1906, left for St. Paul. The plaintiff and her husband had not gotten along well prior to this time, and she had refused to live with him. Plaintiff's husband, however, did not want her to go to St. Paul. After the plaintiff had gone to St. Paul, she and her husband corresponded. In February she sent her husband a telegram, stating that the baby was sick and for him to come. He started immediately, but did not reach St. Paul until after the baby died. On the day of the funeral, plaintiff and her husband consorted together and the next day, which was February 21, 1907, plaintiff's husband endeavored to effect a reconciliation with her. She testified that he cursed her and abused her and she refused to live with him as his wife. It was then agreed that he return to this state and procure a divorce. He returned but did not seek a divorce. Later, in the month of April, 1907, she came to this state and brought an action for divorce upon the ground of cruelty. Her husband resisted the divorce, which was granted on

May 16, 1908. She thereafter, on October 30, 1909, brought this action.

It is apparent from the evidence of the plaintiff in this case that, whatever the defendants said or did to alienate the affection of plaintiff's husband was said and done prior to October 30, 1906, and it is also apparent that, if her husband ceased to love and consort with her, he ceased to do so many days prior to October 30, 1906. The evidence is clear that the last thing that defendants or either of them said or did to separate the plaintiff and her husband was about October 15, 1906, when they ordered the plaintiff to leave the premises. It is apparently not claimed, and could not well be claimed from the evidence, that defendants did anything after that time, for the separation was then complete. But plaintiff contends that because her husband came to St. Paul on or about February 20, 1907, and consorted with her for one day, the statute did not begin to run until that time. But her testimony is clear to the point that she then refused to live with her husband who solicited her to do so. If the conduct of his parents had previously incited him against her so that he was cruel to her and abused her so that she could no longer endure him, there is no evidence to show that they did anything new at that time. Whatever they did was done previously to that time; and if she lost the affection or consortium of her husband, it was lost prior to that time and she knew it. If she had then gone to live with the husband, and in good faith had endeavored to regain his affection, and if the defendants thereafter had incited him against her, no doubt the cause of action would begin to run from the last wrongful act of the defendants. But that state of facts did not occur. The plaintiff's husband sought her to live with him, but she refused, and they then agreed to be divorced—not on account of what occurred there, but of what had previously taken place. The wrong of the defendants, if any, was committed more than three years prior

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to the time the action was begun, and was, during all that time, within the knowledge of the plaintiff.

The trial court for this reason should have sustained the motion for nonsuit made by the defendants. The judgment is reversed and the cause ordered dismissed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

[No. 9589. Department One. December 26, 1911.]

ALMA D. KATZ, *Respondent*, v. O. B. HATHAWAY *et al.*,
Appellants.¹

VENDOR AND PURCHASER—CONTRACT—FORFEITURE—RESCISSION BY VENDOR—TENDER OF DEED. Where a contract for the sale of land contained no forfeiture clause, and all the installments except the last one were paid, the agreements to make the last payment and to deliver a conveyance are mutual and concurrent, and the vendor cannot rescind and claim a forfeiture where he did not tender a deed, and was not in a position to convey a good title until after the vendee had tendered the purchase price.

Appeal from a judgment of the superior court for Clarke county, Mitchell, J., entered December 22, 1910, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Affirmed.

A. E. Clark and Miller, Crass & Wilkinson, for appellants.

L. H. Tarpley, Thos. O'Day, and R. H. Back, for respondent.

MOUNT, J.—This action was brought by the plaintiff to enforce specific performance of a contract. Upon the trial of the case to the court without a jury, a decree was entered substantially as prayed for in the complaint. The defendants Hathaway and wife have appealed.

The contract sued upon is as follows:

"Articles of agreement, made and entered into by and between O. B. Hathaway and Dolla Hathaway, husband and

¹Reported in 119 Pac. 804.

wife, of Clarke county, state of Washington, the parties of the first part, and C. D. Charles, trustee, of the county of Multnomah, state of Oregon, the party of the second part; Witnesseth: That said parties of the first part hereby covenant and agree, that if the party of the second part shall first make the payments and perform the covenants herein-after mentioned on his part, to be made and performed, the said parties of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatever, by a general warranty deed, the following described real property situated, lying and being in the county of Clarke and state of Washington, to wit: [Then follows a description of 469 acres of land] and the said party of the second part hereby covenants and agrees to pay to said parties of the first part the sum of thirty-five thousand (\$35,000) dollars in the manner following: \$20 no-1-100ths (Twenty Dollars) cash in hand paid, the receipt whereof is hereby acknowledged by said parties of the first part; \$5,000 no-1-100ths (Five Thousand Dollars) on or before the 1st day of September, 1906, and the balance of \$29,980 no-1-100ths (Twenty-nine Thousand Nine Hundred Eighty Dollars) on or before the 1st day of January, 1908. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties. It is mutually agreed also that if the tract first herein-before described contains less than 400 acres, a corresponding deduction of \$75.00 per acre shall be made from the full purchase price aforesaid. It witness whereof the parties to these presents have hereunto set their hands and seals this 18th day of June, 1906."

This agreement was duly signed by all the parties to it, and was acknowledged and delivered, and was recorded in the record of deeds for Clarke county, Washington, where the land is situated. It is conceded that the first two payments were made as they became due. It is also admitted that there was a mortgage of \$2,000 upon the premises at the time the contract was made, which mortgage has not yet been satisfied. It is also admitted that the plaintiff is the successor in interest of C. D. Charles, trustee, with whom

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the contract was made, and that the final payment was not made when it became due; but in October, 1908, plaintiff requested a deed which was refused, and in February, 1909, plaintiff made a formal tender of the balance due with interest, and demanded the deed in compliance with the terms of the contract, which defendants refused. Defendants made no offer to return the purchase money paid, and did nothing to put the plaintiff in default. Mr. Hathaway testified that in April, 1908, some four months after the date fixed in the contract for final payment of the balance due, he was willing to comply with the contract, but made no offer to do so. In fact, after the final payment became due, neither party seems to have made any move until about the time the tender was made as above stated. This action was begun in March, 1909. The defendants in their answer to the complaint alleged that time was of the essence of the contract, and that the payments made were to be forfeited in case final payment was not made as agreed; but by mutual mistake these provisions were omitted, and the prayer was for a revision of the contract in this respect. This defense, however, was abandoned at the trial, and the defense relied upon here now is that, after the first two payments were made, the contract was abandoned by all the parties to it and their assigns.

It appears from the evidence in the case that, before the second payment of \$5,000 became due, the contract was assigned by C. D. Charles, trustee, to the Oregon, Washington & Idaho Finance Company, a corporation. This corporation borrowed \$8,000 of certain citizens residing at Vancouver, Washington, near where the land was located. This contract and others of the same nature were deposited with a trustee as security for the repayment of the loan. Five thousand dollars of the money so borrowed was paid upon this contract, and the remainder of the \$8,000 was used to pay debts of the corporation. The \$8,000 note was not paid when it matured, and some of the persons who had participated in

the loan thought the corporation would not be able to repay the loan. But no demand was made for their money until July, 1908. Soon after demand was made, the note was paid with interest. Before this time, however, Mr. Hathaway consulted some of those persons to find out what he should do to remove the cloud from his title, and was advised to bring a suit for that purpose. But this was not done, and no tender or deed or offer to perform was made by the defendants so as to put the plaintiff in default. While it is true that the corporation named did not have sufficient money to meet these obligations, it is clearly established that it had credit and that its stockholders stood ready at any time to advance money to meet all its obligations, and that as soon as a demand was made for the amount due on the \$8,000 note for which this contract was held as security, the money was forthcoming.

It is said that the property has largely increased in value since the date of the contract. Some of the witnesses placed the value at the time of the trial at \$40,000, and others as high as \$200,000. It is apparent that the property has at all times been worth as much as or more than the price fixed in the contract. We are satisfied that there has been no abandonment of the contract by the plaintiff or the corporation from which he obtained it. It is true that the final payment was not made when it became due, and no offer to pay was made for several months thereafter, but no demand for payment or offer to convey the title was made by defendants so as to put the plaintiff in default. In the case of *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837, 28 L. R. A. (N. S.) 956, we said:

"If the case of *Stein v. Waddell* and the succeeding cases to which we have referred have been hitherto misunderstood, we desire now, for the sake of certainty, to lay down the rule that, where land is sold under a time contract calling for payment by installments, and every installment has been paid except the last one, the vendor may, if he act with reasonable promptness, declare a forfeiture, unless by the

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terms of the contract he has agreed to perform some act necessary to the complete performance of his agreement, as, for instance, the giving of an abstract or the tender of a deed, in which event his power to forfeit depends upon his offer and ability to perform; for, as this court has said, his duty to tender performance depends upon, and is concurrent with, the duty of the vendee to meet the final payment."

In *Tacoma Water Supply Co. v. Dumermuth*, 51 Wash. 609, 99 Pac. 741, we said:

"After the respondents acquired their deed from the state, their obligation to convey and the obligation on the part of the purchaser to pay the purchase price became mutual, concurrent and dependent and neither party could thereafter put the other in default or claim a forfeiture without first tendering performance on his part; and this, whether the contract contained a forfeiture clause or not. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16; 2 *Warvelle, Vendors*, p. 824. Under the above authorities, the respondents could only claim a forfeiture and put the appellant in default by tendering a deed and demanding payment of the purchase price"

The contract in this case contained no forfeiture clause. Five thousand and twenty dollars, a substantial sum, had been paid on the purchase price of the land. It would seem equitable that some notice should be given to the vendee by the vendor before he would be permitted to forfeit the contract and keep the land and money too, when there was no provision in the contract that time was of the essence of it. The contract provided that the vendor would "convey and assure to the party of the second part in fee simple, clear of all incumbrances whatever," the real property. It appears that the property was at that time, and ever since has been, incumbered by a mortgage. The defendants therefore have not been in position to tender the deed they had agreed to give.

It is argued by appellant that, "where a vendee delays in completing a contract in order that he may speculate upon

the chances of business proving to be an advantageous bargain or that through rise in value or other changes of circumstances his gain may be assured, and then when he is thus certain it will be a fortunate speculation, offers to perform and sues to compel a conveyance by the vendor, a court of equity will refuse to grant him the remedy even though he may have at an earlier day paid a part of the purchase price." This is not an inflexible rule. It applies, of course, where the equities of the case demand its application, and where the vendor himself has not been at fault. But if the vendor, by agreement or inaction, acquiesces in delay, or is attempting himself to take advantage of the same circumstances, it is plain the rule would not apply. In *Conner v. Clapp*, 42 Wash. 642, 85 Pac. 342, we said:

"The respondents complain that the property has increased in value, and that the appellant is only seeking to take advantage of said increase. Undoubtedly this circumstance is a source of much litigation; but we might well ask, are not the respondents prompted by the same motive in their defense? Had the value of this property decreased below the amount due on the bond for a deed, would the respondents be now resisting specific performance?"

Mr. Hathaway testified that he was perfectly willing to comply with the contract after the date when the last payment became due, but a few months later when the value began to increase rapidly he was not willing to do so. In short, when he might have repudiated the contract simply because the payment was not made on time, he neglected to do so; but after values began to increase, he refused to perform. The reason is obvious.

It is also argued that the contract is void because it was assigned to a corporation not authorized to do business in this state, and because the plaintiff is not the real party in interest and therefore not entitled to maintain this action. There is no showing upon the record to justify either of these contentions.

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Syllabus.

We are satisfied from the whole record the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., PARKER, and FULLERTON, JJ., concur.

[No. 9813. Department One. December 26, 1911.]

W. M. HEIM *et al.*, Respondents, v. J. S. ELLIOTT *et al.*,
Appellants.¹

MECHANICS' LIENS—CLAIMS—NOTICE—DUPLICATE STATEMENTS—MATERIALS. Subcontractors furnishing the materials and doing the work of putting down hard wood floors in a building and installing a plumbing and heating plant must deliver duplicate statements of the materials furnished at the time the same are delivered, in order to obtain a lien for the material, under Rem. & Bal. Code, § 1133, providing that "every person" furnishing material to be used in the construction of a building deliver duplicate statements thereof to the owner.

SAME—DUPLICATE STATEMENTS—LABOR. Subcontractors furnishing material and doing work in the putting down of hard wood floors and installing plumbing and heating plants in a building are entitled to a lien for the value of the labor under Rem. & Bal. Code, § 1129, although they lost their lien for materials through failure to deliver duplicate statements to the owner of the material used, as required of materialmen by § 1133, and although the material and labor were furnished under an indivisible contract with the general contractor.

SAME—MATERIALS TO BE FURNISHED—DUPLICATE STATEMENTS. Rem. & Bal. Code, § 1133, requiring a materialman to deliver to the owner duplicate statements of material furnished at the time the same is delivered, is not substantially complied with by delivering with the first load one duplicate statement of all material to be furnished, where the deliveries were continued from day to day and extended over a period of several months.

MECHANICS' LIENS—MATERIALS FURNISHED—ITEMS LIENABLE—DUPLICATE STATEMENTS—PARTIAL PAYMENTS—APPLICATION. Where the first part of lumber furnished to the general contractor for a building was not lienable because the lumber company failed to deliver duplicate statements to the owner during all the time the lumber was delivered, partial payments made to the lumber company

¹Reported in 119 Pac. 826.

without any direction as to their application may be applied by the company to the oldest items of the account, and a lien established for the balance of the last items furnished for which duplicate statements were delivered; and the owner cannot defeat such application by asserting that a bonding company not a party to the suit had an equity to have the payments otherwise applied.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 15, 1911, upon findings in favor of the plaintiffs, in an action to foreclose mechanics' liens. Affirmed in part and reversed in part.

William A. Greene and James B. Murphy, for appellants.

S. A. Keenan, for respondents Heim *et al.*

Reynolds, Ballinger & Hutson, for respondent Ballard Lumber Company.

Peterson & Macbride, for respondent Bailey-DuBois Sash, Door & Manufacturing Company.

GOSE, J.—The appellants, as the owners of two lots in the city of Seattle, on September 3, 1909, entered into a contract with the respondent Martin, hereafter called the contractor, whereby the latter agreed to furnish all the labor and material and erect a dwelling house on the lots, for a stipulated price. The respondent Wilkinson thereafter, in pursuance of an agreement with the contractor, furnished the material for and installed and finished the hard wood floors. The contract price therefor was \$194. Thereafter, at the contractor's request, Wilkinson did extra work of the value of \$15.50. No payments were made upon this contract. The respondent Heim, in pursuance of an agreement with the contractor, furnished the material and labor for and installed the plumbing and the heating plant. The contract price was \$2,050. The alleged balance is \$666.98. At the conclusion of the trial, a judgment was entered against the contractor in favor of the respondent Wilkinson for \$209.50, and in favor of the respondent Heim for \$472.98, and making these amounts a lien against the appellants'

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property. The facts applicable to the other respondents will be stated in discussing the liens decreed in their behalf. The owners of the property have appealed.

The respondents Wilkinson and Heim contend that they are subcontractors, and that they were not required to deliver or mail to the owner a duplicate statement of the material which they furnished. This contention is not tenable. Our statute, Rem. & Bal. Code, § 1133, provides that "every person" furnishing material to be used in the construction of a building "shall at the time" the material is delivered, deliver or mail to the owner of the property upon which the material is to be used a duplicate statement of all material delivered, etc. It seems clear, therefore, that the respondents having failed to deliver the duplicate statements, cannot be allowed a lien for the material which they furnished. *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083.

The respondent Wilkinson testified that the labor performed in completing his contract was of the value of \$117.61, and the respondent Heim testified that the same item in his contract was of the value of \$546.20. The respondents contend that these items are lienable. The appellants assert that they are not lienable, because the contract of each of the respondents with the general contractor was entire. They had no contract with the appellants. Hence, there was no privity of contract between them. *Hunnicutt & Bellingrath Co. v. Van Hoose*, 111 Ga. 518, 36 S. E. 669. Rem. & Bal. Code, § 1129, entitles these respondents to a lien for their labor, and we do not think that this right is defeated because the contract with the general contractor was indivisible. Such a determination would not be in harmony with the rule of liberal construction enjoined by the provisions of Rem. & Bal. Code, § 1147. The lien of the respondent Wilkinson will be reduced to \$117.61, and the lien of the respondent Heim will not be disturbed. The court made a deduction of \$194 from his claim on account of defective workmanship.

The respondent Ballard Lumber Company was given a lien upon the property for \$467.23. In September, 1909, it contracted with Martin, the general contractor, to furnish material to be used in the erection of the dwelling. It commenced delivering the material in pursuance of its contract on September 14, 1909, and continued until March 31, 1910. The deliveries were continued from day to day. On the date of the first delivery it mailed to the appellants a duplicate statement of all the material covered by its contract. No other duplicate statement was mailed to the appellants, and none was delivered to them. This lien should not have been allowed. The duplicate statement was not mailed "at the time" such material was delivered. This respondent invokes the rule of liberal interpretation. To enforce this lien would be legislation rather than interpretation. Six and one-half months elapsed between the first and the last deliveries. The statute was not substantially complied with. *Finlay v. Tagholm, supra*.

The respondent contractor purchased material from the respondent Bailey-Du Bois Sash, Door & Mfg. Company, of the value of \$2,269.80, to be used in the erection of appellants' dwelling. Of this amount, \$1,165.45 was delivered between January 28 and April 6, 1910. The balance was delivered prior to January 28. It is admitted that no statement was mailed or delivered to appellants prior to January 28. The evidence is conflicting as to whether respondents mailed the duplicate statements on and after January 28. A reading of the evidence, however, has convinced us that it mailed the statements conformably to the statute after that time. A judgment was entered in favor of the respondent against the contractor for \$923.60, and a lien was established in its favor against the appellants' property for that amount. The following payments were made on the account before the commencement of the suit: December 7, 1909, \$400; April 5, 1910, \$200; April 26, 1910, \$746.11. The last two payments were made out of the contractor's money

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by an agent of the company which had bonded him. When the payments were made, no directions were given as to how they should be applied. The respondent credited them as they were severally made upon the oldest items of the account. If these credits were properly made, or if the law would make a like application when the debtor gives no direction as to how he wishes the payment applied, the lien was properly established. The appellants concede that, in the absence of a direction by the debtor or an application by the creditor, the general rule is that the first item on the debit side of the account is discharged or reduced by the first item on the credit side. They contend, however, that this rule is not applicable here, because the bonding company through whom the payments were made has an equity in the money. We do not understand how this question is open to the appellants. The bonding company is not a party to the suit. Assuming, however, that the appellants may raise the question, we do not think the authorities cited are controlling upon the facts before us. In the case of *Crane & Co. v. Pacific Heat & Power Co.*, 36 Wash. 95, 78 Pac. 460, cited by the appellants, the creditor had applied the payments to prior accounts having no connection with the building which was the source of the fund from which the payments were made. In *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 71 N. W. 624, it was held that the obligee in a bond as against a surety could not apply payments made by the principal to a debt which the principal owed before the bond was given. It is argued that the payments made in the case at bar were affected with an equity in favor of the surety. The equity of the surety in this fund was less than the equity of the respondents. The money belonged to the principal. The material furnished by the respondent was one of the sources of the fund. The surety had, so far as the record discloses, contributed nothing to the source which furnished the fund. Where a party performs work upon and furnishes material for a building, some of which embraces extra work which is

not lienable, and has received partial payments without any direction as to their application, a court of equity will apply the payments to the nonlienable account. *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589. The lien was properly allowed.

The judgment will be reversed, with directions to enter a judgment conformably to this opinion.

PARKER and MOUNT, JJ., concur.

[No. 9861. Department One. December 26, 1911.]

RUCKER BROTHERS, INCORPORATED, *et al.*, Appellants, v. THE CITY OF EVERETT *et al.*, Respondents.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—CONFIRMATION—OBJECTIONS—TIME FOR MAKING. Under Rem. & Bal. Code, § 7532, providing that the regularity, validity and correctness of a local assessment must be challenged when the roll is before the city council for confirmation and all objections not so made are conclusively waived, and § 7533, providing that the assessment becomes conclusive in all things upon all parties not appealing therefrom, an objection to an assessment in that it exceeds fifty per cent of the assessed valuation of the property, in violation of the city charter, is waived if the objection is not made before the city council and appeal taken.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 28, 1911, after a trial on the merits, dismissing an action for equitable relief. Affirmed.

Coleman, Fogarty & Anderson, for appellants.

Benj. W. Sherwood and Ralph C. Bell, for respondents.

PARKER, J.—This action was commenced by summons and complaint, in the superior court for Snohomish county, seeking a decree annulling a local improvement assessment which had theretofore been made and confirmed by the city council

¹Reported in 119 Pac. 807.

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of the city of Everett. From a judgment dismissing the action, the plaintiffs have appealed to this court.

The facts shown by the record before us which we regard as determinative of the rights of the parties are not controverted, and may be summarized as follows: In the spring of 1908, the authorities of the city instituted proceedings looking to the improvement of certain streets therein at the expense of the property to be benefited. These proceedings resulted in the creation of a local improvement district, the construction of the improvement, the assessment of the cost thereof against the property benefited, and the confirmation of that assessment by the city council. None of the property owners objected to the assessment prior to, or when it was before the council for, confirmation, nor did any of the property owners appeal to the superior court from the confirmation by the council. The cost of the improvement was considerably more than fifty per cent of the total assessed valuation of the lots and lands contained in the assessment district, as that valuation appeared upon the assessment rolls of the county made for general taxation. No petition of the property owners was filed with the city authorities giving their consent to an assessment to pay the costs of the improvement in an amount exceeding fifty per cent of the value of the property of the district, as fixed by its assessment for general taxation. The improvement was authorized by an ordinance of the city council passed by a two-thirds vote of all the members thereof.

No contention is made here requiring our notice, save that, in the making of the assessment in a total sum exceeding fifty per cent of the assessed value of the property for general taxation, the city council exceeded its jurisdiction to the extent that the assessment is not rendered valid by its confirmation, notwithstanding that no objections were then made thereto nor any appeal taken therefrom to the superior court. No other irregularity in the proceedings, nor any want of notice to the property owners provided by ordinance

or charter, is claimed by appellants. Neither is it claimed that there is any want of due process of law in the notice so provided for, giving the property owner a hearing upon the confirmation of the assessment. Neither is it contended that the property is not benefited to the amount of the assessment.

Everett, being a city of the first class, and having power under the state constitution to frame and adopt its own charter, has therein provided in subd. 2, § 138, relating to the power of local assessment, as follows:

"The city council shall have full authority to consider all matters in relation to such proposed improvement, and may authorize the same by ordinance or refuse it in its discretion: provided, that unless the petition for said improvement shall be signed by three-fourths of the property to be assessed therefor and specifies a greater percentage than fifty per cent, the city council, or board of public works shall not have authority to further proceed in the matter of such improvement whenever the cost of any such improvement or work ordered to be done by the city council and chargeable as a lien against the property specially benefited within such assessment district shall exceed fifty per cent of the total assessed valuation of the lots or parcels of land contained in such assessment district as the same appears upon the last annual assessment roll, made for the levying of taxes for municipal purposes, in which case such improvement shall not be granted unless the same be so modified that the cost thereof shall not exceed such fifty per cent of the aforesaid valuation. Said limit of fifty per cent, however, may be extended when any improvement shall be petitioned for by the owners of three-fourths of the property to be assessed for said proposed improvement, and when such petition specifies not to exceed a certain higher percentage."

This subdivision also gives the council the power to construct local improvements at the cost of the property benefited thereby, without petition of the property owner, with this restriction:

"Provided, that unless a petition as hereinbefore prescribed be presented, such improvement shall not be or-

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dered except by ordinance passed by the affirmative vote of two-thirds of all the members of the city council."

The charter also provides for notice to property owners of a hearing before the council when the roll is before it for confirmation. No question is raised, however, touching the regularity of this step in the proceedings, as we have already noticed.

We are now confronted with the question, what is the effect of the confirmation of this assessment upon the rights of appellants for which they are here contending? Was that confirmation a final adjudication as against the contentions which the appellants are here making, or is the power of the council so circumscribed by the charter provisions above quoted, that we must hold the assessment beyond the fifty per cent limit to involve a question of jurisdiction which cannot be foreclosed against the property owners by the confirmation of the assessment. There is language in the charter which, at least inferentially, indicates that, in order to avail themselves of this infirmity in the assessment, the property owners must object to the assessment upon the hearing before the council. However that may be, there are certain provisions of our statute law providing for the confirmation of assessments for local improvements by the council, and for a review of such confirmation in the courts at the instance of the property owners, which seem to fully answer our inquiry. Rem. & Bal. Code, § 7532, relating to local improvement assessments by cities of the first class, provides:

"Whenever any assessment roll for local improvements shall have been prepared as provided by law, charter or ordinance of any city of the first class, and such assessment roll shall have been confirmed by the council or legislative body of such city, after due and proper notice to the property owner, as provided by law, charter or ordinance, so that said owners of property may have a reasonable opportunity to object to or protest against any assessment, the regularity, and correctness of the proceedings to order said improvement, and the regularity, validity and correctness of said assessment

cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll, prior to the same being confirmed, as aforesaid, and at such time or times as may be prescribed by charter or ordinance. Upon any objections being filed as aforesaid, the council or other legislative body, at the time set for hearing objections to the confirmation of said roll, or at such time as said hearing may be adjourned to, shall have power to correct, revise, change or modify such roll, or any part thereof, and to set aside such roll and order that said assessment be made *de novo*, as to such body shall appear equitable and just, and shall confirm the same, as corrected, by resolution or ordinance, in conformity with the charter of such city. All objections shall state clearly the grounds of objection, and objections to such assessment roll or to the assessment proceedings not made before such council, or other legislative body, as aforesaid, shall be conclusively presumed to have been waived."

Rem. & Bal. Code, § 7533, declares the effect of the confirmation by the council as follows:

"The action of the council or other legislative body, hereinbefore mentioned in confirming such assessment roll shall be conclusive in all things upon all parties not appealing therefrom in the manner and within the time hereinbefore mentioned, and no proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment or the foreclosure of any lien herein provided for: Provided, this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds: (1) That the property about to be sold does not appear upon the assessment roll, and (2) that said assessment has been paid."

Then follow provisions enabling the property owners to have the confirmation reviewed in the courts by direct appeal from the action of the council. All of these statutory provisions were in existence when the city of Everett framed and adopted its charter under which this improvement and assessment were made. This may account for the lack of specific language in the charter declaring the effect of the con-

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firmation of the assessment roll by the council. It will be noticed that by the express terms of § 7532 the "*regularity, validity, and correctness*" of the assessment are to be challenged only as therein provided, and by the express terms of § 7533, the assessment becomes "*conclusive in all things upon all parties not appealing therefrom,*" except in the two particulars mentioned, with which we are not here concerned. It seems to us that this language is amply comprehensive to render unavailing, after confirmation and failure to appeal therefrom, an objection upon the ground that the assessment exceeds the fifty per cent charter limit. This objection in its last analysis is only an objection to the amount of the assessment, and does not go to the power of the city to make the improvement and to assess the property to some extent to pay the cost thereof. These statutory provisions are fully as comprehensive as those of the same character found in the reassessment law of 1893, Rem. & Bal. Code, § 7898, which this court has repeatedly held, preclude a review of the assessment save by objections thereto before the council and appeal therefrom to the courts. Among the early expressions of this court so holding, is one found in *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353, as follows:

"No reason is suggested why respondent did not appear and make his objection before the town council. That body had jurisdiction of the subject-matter and was clothed with power to arrive at a correct determination. It was the tribunal appointed by the law for the correction of any mistakes or irregularities. Parties interested cannot be permitted to disregard the opportunities so afforded for a hearing, and to select a forum of their own choosing. They must make their objections seasonably, before the tribunal which the law appoints for that purpose, and, failing to do so, cannot thereafter be heard to complain."

This view has been adhered to in the following decisions: *New Whatcom v. Bellingham Bay Imp. Co.*, 18 Wash. 181, 51 Pac. 360; *Northwestern & Pacific Hypotheek Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Annie Wright Sem-*

inary v. Tacoma, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686.

Now let us assume, for argument's sake, that none of the objections to the assessments involved in these cases were of so serious a nature as that made against this assessment. Whatever may be said of this excessive assessment, the requirement that it shall not exceed fifty per cent of the assessed valuation of the property for general taxation exists only because it is contained in the charter. There is no constitutional limit of this nature to local assessment taxation. Hence, the law-making power could have left the amount entirely without limit of this nature, or could have fixed any limit deemed expedient. The same power—that is, the charter or statute-making power—could provide that the question of the amount of the assessment shall become conclusive against the property owners upon the decision of the city council confirming the assessment, when such decision is rendered upon notice to the property owners amounting to due process of law. A requirement of the law to be observed in levying a tax by taxing officers, which requirement could have been dispensed with by the law in the first instance, can become conclusive as to its observance, against the property owner, by the law awarding him a hearing thereon. That is what has been done by these statutes, which declare the effect of the decision upon such hearing in such comprehensive language as to render finally adjudicated against appellants the objections now made against this assessment. This is, in substance, the theory upon which tax deeds may be made conclusive evidence of the observance of requirements in the tax proceeding which the law-making power might have dispensed with in advance. *Black, Tax Titles* (2d ed.), § 452. These charter and statutory provisions, in effect, say that the assessment shall not exceed fifty per cent of the assessed value of the property for general tax-

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ation, but if the assessment be not objected to on that account upon the confirmation hearing, such objection is thereafter foreclosed and the validity of the assessment rendered conclusive against the property owner. These provisions leave the property owner in no worse situation than as if they had left the power of assessment unlimited in the first instance; hence, while they give this right to the property owner, they also provide a method by which it may be lost for want of objection on his part.

In *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277, there is language used relied upon by counsel for appellants which might be construed to mean that this court was of the opinion that, under no circumstance, could an assessment exceeding the fifty per cent limit be upheld, even after confirmation. That language, however, was only used as indicating the general nature of the charter provision. We find no holding in that case that such an objection would avail the property owner other than by making it before the council upon confirmation of the assessment, and appealing therefrom to the courts. That case did not call for a discussion of the question here involved. We are of the opinion that appellants cannot now urge against this assessment their claim that it exceeds the fifty per cent limit prescribed by the charter, since they did not make that objection before the council, nor did they appeal from the council's action confirming the assessment to the courts. That right has been lost to them by a notice and proceeding which constituted due process of law.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9828. Department Two. December 26, 1911.]

NORTH COAST RAILROAD COMPANY, *Respondent*, v.
MARY V. NEWMAN *et al.*, *Appellants*.¹

EMINENT DOMAIN—EVIDENCE—VALUE OF PROPERTY—OFFERS. In eminent domain proceedings, upon an issue as to the value of the property, it is not admissible for the defendant to show offers made for the land.

SAME. In eminent domain proceedings, evidence of offers for the land is not made admissible on redirect examination by the fact that on cross-examination a witness had volunteered a statement as to offers which was struck out as not responsive to the question.

Appeal by defendants from a judgment of the superior court for Spokane county, Sullivan, J., entered December 17, 1910, upon the verdict of a jury, awarding damages in condemnation proceedings. Affirmed.

W. C. Jones, for appellants.

Danson & Williams (George D. Lantz, of counsel), for respondent.

MORRIS, J.—This was a proceeding to condemn land for railroad purposes. The errors assigned grow out of the refusal of the court to permit appellants' witnesses to testify as to offers made for the purchase of lots. It has been settled in this court that, in proceedings of this character, such evidence is not admissible to prove value. *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Chicago, M. & St. P. R. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 626; *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496, 135 Am. St. 971.

Appellants contend that this evidence was admissible on redirect examination, because of the character of the cross-examination of appellants' witnesses. Such cross-examination is too lengthy to set out here. We can, however, find nothing in it to sustain appellants' contention. It is un-

¹Reported in 119 Pac. 823.

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questioned that, where matter inadmissible in the first instance is brought out by the cross-examination, the door is opened for an examination as to such matter on the redirect. Such, however, is not the situation here.

A witness for appellants had testified the value of inside lots to be \$850. On cross-examination he was asked:

"Q. Now, I understand you to say that these lots inside are worth, in your opinion, \$850? A. Yes, sir. Q. Well, that means when you sell them to the railroad, don't it? A. No, sir. I was offered \$800 for mine across the street and I refused."

This answer was stricken on motion of respondent. It is apparent it was not responsive to the question, and a volunteer statement by the witness, and as such properly stricken. As before stated, there was nothing to justify the admission of this offer as evidence of the value of the lots.

Some complaint is made in the briefs that respondent's value witnesses were not shown to be competent. There is no merit in this contention.

Finding no error, the judgment is sustained.

CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9715. Department Two. December 26, 1911.]

FIRST NATIONAL BANK OF SNOHOMISH, *Respondent*, v.

J. E. SULLIVAN *et al.*, *Appellants*.¹

BILLS AND NOTES—NEGOTIABILITY—AGREEMENT TO APPLY PROCEEDS OF SALE. A promissory note for a specified sum payable on demand is not made conditional as to amount or uncertain as to time, so as to be nonnegotiable, within the definition of Rem. & Bal. Code, § 3392, by the addition of a provision that this note is given to take up the freight and rehandling of a certain car and proceeds from resale of car to apply on the note; since, construing all of the terms of the note together, the agreement does not make the note payable only out of the proceeds of the resale of the car, but was

¹Reported in 119 Pac. 820.

to apply proceeds in case of a resale before demand, and to reimburse the makers in case of resale after demand.

BILLS AND NOTES—NEGOTIABILITY—CONDITIONS. Rem. & Bal. Code, § 3394, defining an unconditional promise to pay as one which designates a particular fund out of which reimbursement is to be made, but not to pay only out of a particular fund, is but declaratory of the common law, and a note is negotiable if the general credit of the maker accompanies the note.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 21, 1910, upon findings in favor of the plaintiff, in an action upon a promissory note, after a trial before the court without a jury. Affirmed.

G. W. Hinman, for appellants.

Coleman, Fogarty & Anderson, for respondent.

ELLIS, J.—The respondent, as endorsee and holder, sued the appellants as makers of a promissory note which, with the endorsements thereon, was as follows:

“\$400. Snohomish, Wash., Apr. 25, 1908.

“On demand, after date, for value received I (we) promise to pay to the order of Springfield Shingle Co. at the First National Bank in the city of Snohomish, the sum of Four hundred no-100 Dollars with interest thereon at the rate of 8 per cent per annum from date until paid. The interest shall be paid at the expiration of every and if default be made in the payment of any installment of interest when the same shall become due, then the whole of this note, both principal and interest, shall forthwith become due and payable without demand. Both principal and interest payable in United States Gold Coin of the present standard of weight and fineness. If suit shall be commenced for the recovery of any amount due upon this note, I agree to pay a counsel fee of per cent, upon the amount which may be found due, and the whole of the judgment in such suit including attorney's fees and costs of suit, shall bear interest at the rate of per cent per annum from its date until paid, and it may be so provided in said judgment.

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"The maker and all endorsers hereof, and each and every party to this note severally waive presentation and demand for payment, protest and notice of protest, and notice of nonpayment of this note.

"This note is given to take up the freight and rehandling of N. P. Car 43607 and proceeds from resale of said car shall apply on this note."

Sullivan Bros.

By H. W. Sullivan,

H. J. Sullivan.

Endorsed:

"No. 22438.

"Springfield Shingle Co.,

"By H. E. Gampp, Sec'y.

"Paid on Acc't Nov. 17, 1908, \$200.00.

"Interest paid to Dec. 25, 1908, \$19.69."

The answer admitted the execution of the note, the payment of the amounts endorsed thereon, denied that there was any balance due, and set up an affirmative defense in the nature of a counterclaim to the effect that, prior to the making of the note, the appellants sold to the Springfield Shingle Company, payee, certain shingles under an agreement that they were to receive from that company 62½ cents for every 100 pounds of underweight, and were to pay to the shingle company a like amount per hundred for overweights. There was a further allegation that the underweights exceeded the overweights by \$537.34 which amount has never been paid by the Springfield Shingle Company to the appellants. The cause was tried to the court without a jury. The court, holding that the note was negotiable, refused to admit evidence in support of the counterclaim; and upon sufficient findings of fact and conclusions of law, entered judgment in favor of the respondent. From that judgment, this appeal was prosecuted.

The only question presented for our consideration is that of the negotiability or nonnegotiability of the note. The first section of the negotiable instruments act (Laws 1899,

p. 340, § 1; Rem. & Bal. Code, § 3392), defining such instruments contains the following:

"An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) Must contain an unconditional promise or order to pay a sum certain in money; (3) Must be payable on demand, or at a fixed or determinable future time; (4) Must be payable to order or to bearer."

The note here in question obviously conforms to this definition, unless it is made conditional as to amount or uncertain as to time by the following sentence: "This note is given to take up the freight and rehandling of N. P. car 43,607 and proceeds from resale of said car shall apply on this note." It is clear that the note, exclusive of this sentence, is not obnoxious to the definition in either of these particulars. It was payable on demand, thus falling within the very terms of the statutory definition as to time of payment. Giving to the words of the above quoted sentence their natural and ordinary significance it cannot be held to make the note payable otherwise than on demand. They do not stipulate, either expressly or by any implication, necessary or otherwise, that the note shall be payable only out of the proceeds of the resale of the car of shingles. Nor do they make the payment contingent upon or subject to a resale. There is no provision that demand shall be postponed to a resale.

This note, like every other written instrument, must be construed as a whole so as to give effect to every part of it, if possible. This can only be done by holding the whole amount due and payable on demand, and that the proceeds of the sale of the shingles, in case of a resale before demand, shall be applied on the amount, but in case of resale after demand the proceeds shall go to reimburse *pro tanto* the makers of the note. This gives effect to every word in the note and makes it an absolute promise to pay on demand with the designation of a fund to reimburse the maker for

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such payment. Any other construction would be to ignore the words "on demand" and arbitrarily substitute in the last sentence the words "payable only out of" for the actual words "shall apply on." These terms are by no means synonymous.

If, as seems inevitable, this note must be construed as payable on demand, it follows that there can be no uncertainty as to the amount. Payment is not made dependent upon the sufficiency of the proceeds of the resale. If demand be made for the payment of such a note immediately after delivery the promise is to pay the full amount. If demand be made after a resale of the shingles, the promise still is to pay the full amount, the proceeds of the shingles to be applied on that amount. If so applied, such application, in the nature of the thing, can have no other or different effect on the promise to pay or upon the amount to be paid than any other partial payment. The promise is still, and from the beginning was, an unconditional promise in writing to pay to order of the payee, and in any event, a sum certain on demand. This meets every requirement of the statutory definition of a negotiable instrument.

The third section of the negotiable instrument act (Rem. & Bal. Code, § 3394), defines an unconditional promise as follows:

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) A statement of the transaction which gives rise to the instrument. But an order or promise to pay only out of a particular fund is not unconditional."

This section is held but declaratory of the common law. Slover, *Negotiable Instruments*, p. 50; *First Nat. Bank of Hutchinson v. Lightner*, 74 Kan. 736, 88 Pac. 59, 118 Am. St. 353, 8 L. R. A. (N. S.) 231. The reference to the consideration of the note, and the direction to apply the pro-

ceeds of the resale of the shingles thereon, must, therefore, be construed in the same manner, and as having the same effect as under the law merchant at common law. The true test in every case is, and was at common law, does the general credit of the maker accompany the instrument? If it does, the note is negotiable, otherwise it is not. 4 Am. & Eng. Ency. Law (2d ed.), p. 89.

In an early case, *Haussoullier v. Hartsinck*, 7 Durnf. & East 733, decided by the Court of King's Bench in 1798, the note read as follows:

"No. 300. Original Security Bank London No. 300.

"35 Cornhill. This 7th day of September 1797. £25. On the 19th day of November next and after that date on demand we promise to pay to or bearer £25, being a portion of a value as under deposited in security for the payment hereof, according to the receipt in our hands. Hartsinck and Co."

The ground of defense was the same as here, and is reported as follows:

"That the notes were not payable at all events, but payable out of a particular fund alluded to in the notes, in case that fund should be sufficient. That the sum secured by one of them was described as 'a portion of a value as,' &c. in terms pointing out the fund out of which it was to be paid. That the payee was of course to resort to that fund and not to the maker at all events.

"But [continues the report] the court said they were clearly of opinion that, though as between the original parties to the transaction, the payment of the notes was to be carried to a particular amount, the defendants were liable on these notes which were payable at all events."

It cannot fail to be noted that the language used in the note in that case was much more capable of the construction contended for than that of the note before us. In *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639, a note reading "six months after date, or before, if made out of the sale of Drake's horse hay-fork and hay carrier, I promise to pay,"

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etc. was held to be an absolute promise to pay, and the note was held negotiable. See, also, *Charlton v. Reed*, 61 Iowa 166, 16 N. W. 64, 47 Am. Rep. 808; *Cota v. Buck*, 7 Met. (Mass.) 588, 41 Am. Dec. 464; *Ernst v. Steckman*, 74 Pa. St. 13, 15 Am. Rep. 542; *Hawley v. Bingham*, 6 Ore. 76; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; *Redman v. Adams*, 51 Me. 429; *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 Am. Rep. 316; *Nichols v. Ruggles*, 76 Me. 25; *Louisville Banking Co. v. Gray*, 123 Ala. 251, 26 South. 205, 82 Am. St. 120; *Corbett v. Clark*, 45 Wis. 403, 30 Am. Rep. 763; *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913, 92 Am. St. 888.

The negotiability of notes and drafts is favored in law, and whenever the promise can be held unconditional without doing violence to the ordinary meaning of the language used, it will be so held. 7 Cyc. 575 *et seq.* Following the decisive trend of authority, both ancient and modern, we hold the note here in question a negotiable instrument.

The judgment is affirmed.

CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 10019. Department Two. December 27, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Anna Gabe, Plaintiff*, v. JOHN F. MAIN, *Judge etc., Respondent*.¹

CRIMINAL LAW—TRIAL—PRESENCE OF ACCUSED—NECESSITY—WAIVER OF RIGHT. Rem. & Bal. Code, § 2145, providing that no person punishable by death or imprisonment shall be tried unless personally present, does not, in cases not capital, preclude the entry of judgment upon a verdict, received in the absence of the defendant, if the defendant, out on bail, voluntarily absents himself without leave, for he thereby waives his right.

SAME—STATUTES—CONSTRUCTION. Upon the question of the necessity of the defendant's presence when the verdict is received, Rem. & Bal. Code, § 2196, providing that a defendant punishable by im-

¹Reported in 119 Pac. 844.

prisonment must be personally present for the purpose of judgment, and if for fine only, he must be present or some responsible person must undertake for him to secure the payment controls § 2145, providing that no person shall be tried unless personally present.

SAME—PRESENCE OF ACCUSED—NECESSITY—ACQUITTAL. Under Rem. & Bal. Code, § 2196, providing that for the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present, and if for a fine only, he must be personally present or some responsible person must undertake for him to secure the payment, it is not necessary that a defendant out on bail be present upon receipt of a verdict of acquittal.

MANDAMUS—TO COURTS—WHEN LIES. Mandamus lies to compel the trial court to enter judgment upon a verdict of not guilty, after refusal so to do.

BAIL—RELIEF FROM FORFEITURE—ACQUITTAL—EFFECT—DISCHARGE OF BOND. A verdict of not guilty in the superior court, upon appeal from justice court, discharges the appeal bond, and judgment forfeiting the bond, even if entered a few minutes before the verdict was received, is error.

MANDAMUS—TO COURTS—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. Where, notwithstanding a verdict of not guilty, the court refused to enter judgment for the defendant, but forfeited her bond and entered judgment against her and her sureties, the remedy by appeal is not adequate, and mandamus lies to compel vacation of the judgment and entry of proper judgment on the verdict.

Application filed in the supreme court November 23, 1911, for a writ of mandamus to compel the superior court for King county, Main, J., to enter judgment upon a verdict. Granted.

W. F. Hays, for plaintiff.

James E. Bradford and *Ralph S. Pierce*, for respondent City of Seattle.

ELLIS, J.—This is an application for a writ of mandate requiring the respondent to enter a judgment, upon the verdict of a jury finding the relatrix not guilty, and also requiring the respondent to vacate his order for judgment against the relatrix and her bondsmen, on her bond on ap-

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peal from a conviction and fine in the police justice's court of Seattle.

The application for the writ and the respondent's return thereto show the following undisputed facts: The relatrix was arrested and tried before the police justice of the city of Seattle for selling liquor without a license, in violation of a city ordinance. She was found guilty, and fined in the sum of \$100, and appealed to the superior court. The cause came on for trial, a jury was empaneled and sworn, the trial proceeded in the usual course, and the jury retired to deliberate upon its verdict. Shortly afterwards, the relatrix and her counsel left the court room. The jury notified the court that they had arrived at a verdict, and the defendant (relatrix) not being present, and not having been excused by the court, the city attorney orally moved the court for an order forfeiting her bail bond, and for judgment thereon against her and her surety, which motion was granted. Immediately thereafter the verdict was received. It was "not guilty." The return states that the court instructed the clerk to receive, but not to file, the verdict. It appears, however, and is not denied, that the verdict was at once received and filed.

A few days afterwards, and apparently as soon as the relatrix learned of the action of the court, she made application to the court for judgment of acquittal upon the verdict, and for a vacation of the judgment upon the bond against her and her bondsmen. Both requests were denied by the court, whereupon this writ was sued out. The affidavits in support of the motion for vacation show, and it is not denied by the return, that, during the trial, the relatrix became ill, and upon the retiring of the jury was advised by her attorney that she might go home, which she accordingly did. The return alleges that the court, noticing that the relatrix and her counsel had left the court room, directed the clerk to notify her counsel that her presence would be necessary when the verdict was received, and that the clerk did so by tele-

phone, and was informed by her counsel that relatrix was feeling unwell and had retired to her sick room, but did not then nor at any time inform the clerk or bailiff that the return of the relatrix would cause anything more than an inconvenience.

The respondent bases the refusal to enter judgment of acquittal, and the right to forfeit the bond, upon Rem. & Bal. Code, § 2145, reading as follows:

"No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial."

Assuming that this section includes the reception of the verdict, it is only declaratory of the common law as applicable to felonies. It has been usually held that after appearing and being placed on trial, in cases of felony less than capital, if the prisoner being out on bail, voluntarily absent himself without leave he will be deemed to have waived his right to be present and the court need not stop the trial, but the verdict may nevertheless be received and published, even when it is a verdict of conviction. *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *State v. Guinness*, 16 R. I. 401, 16 Atl. 910; *State v. Kelly*, 97 N. C. 404, 2 S. E. 185, 2 Am. St. 299; *Lynch v. Commonwealth*, 88 Pa. St. 189, 32 Am. Rep. 445; *State v. Perkins*, 40 La. Ann. 210, 3 South. 647; *Fight v. State*, 7 Ohio 180, 28 Am. Dec. 626; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Jackson v. State*, 49 N. J. L. 252, 9 Atl. 740.

The rule and the reasons therefor are just as applicable under the statute as they were at common law, there being in the statute no express nor necessarily implied prohibition of a waiver. But we do not think the above section of the statute governs the question here under consideration. The necessity for presence of the defendant for the purpose of judgment upon the verdict is determined by Rem. & Bal. Code, § 2196, which is as follows:

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"For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only he must be personally present, or some responsible person must undertake for him to secure the payment of the judgment and costs; judgment may then be rendered in his absence."

This section, being special to that subject, must control the more general terms of § 2145 requiring the defendant's presence at the trial. It is manifest that § 2196 does not militate against the general rule, announced in the decisions above cited, that the verdict should be received and published when the defendant, out on bail, voluntarily absents himself without leave of court. It is also manifest that there is no direct requirement that he be present for the purpose of judgment except in case of conviction. There is a clear implication that in case of acquittal his presence is not necessary. It seems plain, therefore, that the court should have entered a judgment of acquittal upon the verdict of not guilty, there being no claim or showing that the presence of the relatrix was required for the purpose of answering any other charge than that for which she had been tried. The right to this judgment was perfect when the verdict of the jury was returned and filed. Indeed, it has been held that the verdict of "not guilty" operates in itself as a discharge of the prisoner. *Mills v. McCoy*, 4 Cowen (N. Y.) 406.

In any event, the relatrix was entitled, as a matter of right, to a judgment of acquittal when, a few days after the reception and filing of the verdict of "not guilty," she applied for it. In such a case mandamus is the proper remedy. 2 Spelling, Injunction and Other Extraordinary Remedies (2d ed.), §§ 1405, 1407.

On the second branch of the case, it seems equally plain that the forfeiture and judgment on the appeal bond should have been set aside. The verdict of "not guilty" discharged the bond. While the judgment on the bond had

been entered a few minutes before the verdict was received, there can be no question, under the facts shown by the respondent's answer, that, on an appeal from that judgment, it would have to be set aside. *People v. Higgins*, 7 N. Y. Supp. 658; *People v. Madden*, 8 N. Y. Supp. 531; *People v. Cooney*, 9 N. Y. Supp. 285; *People v. Treanor*, 9 N. Y. Supp. 285; *People v. Tietjen*, 9 N. Y. Supp. 285; *People v. Grossman*, 5 N. Y. Supp. 446; *People v. Samuels*, 25 N. Y. Supp. 81; *State v. Saunders*, 8 N. J. L. 218; *Mills v. McCoy*, *supra*.

The respondent contends that, even granting this, the relatrix should be remitted to her right of appeal; that appeal is an adequate remedy and that mandamus will not lie. Upon the facts admitted by the respondent's answer, it was the plain duty of the court to vacate the default and judgment. It had the right to and actually did receive and file the verdict of "not guilty." It was plain at that time that the judgment upon the bond could not stand. Under our statute (Rem. & Bal. Code, § 999 *et seq.*), mandamus is a much broader remedy than the old prerogative writ.

"In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action. The facts stated in the affidavit for the writ may be controverted by a return, raising both questions of law and fact. The return likewise may be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee, as the court may order. Judgment can be entered on the verdict or findings not only directing the issuance of a peremptory mandate, but for damages and costs on which execution may issue. The statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of wilful violations of recognized rights, or denials, made in good faith, that the rights contended for exist. In other words, the right to sue out the writ is not made to depend on the character of the dispute, but on what answer is given to the question, can the ordinary course of law afford a plain, speedy, and adequate

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remedy? If the ordinary course of law will furnish such a remedy, the writ will not issue; otherwise, it will. It was to avoid circuity of action, thus doing away with the necessity of resorting to more than one proceeding for the enforcement of a right, that the law was framed." *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207.

Can it be said that the remedy by appeal is adequate where the absolute right to instant relief is shown by the admitted facts, and where, under those facts, there was no room for discretion on the part of the court? The judgment on the bond was merely ancillary to and an incident of the main case. The relatrix was acquitted by the jury, and the real matter of controversy, and every part of it, was ended in her favor. This carried with it the things ancillary to and dependent upon the main issue. The relatrix was found not guilty, and yet she must in effect pay a fine in double the amount imposed upon her by the police justice, or appeal. Such a remedy would be neither adequate nor in keeping with the spirit of the law. The relatrix having stood her trial, and having been found not guilty, was entitled without any delay to the full fruits of the verdict. She then stood innocent under the law, and had an immediate right to an unqualified discharge.

The peremptory writ is ordered.

DUNBAR, C. J., MORRIS, CHADWICK, and CROW, JJ., concur.

[No. 9680. Department One. December 27, 1911.]

LILLIE L. MCGRAW, *Respondent*, v. MANHATTAN COMPANY
et al., *Appellants*.¹

APPEAL—REVIEW—GRANT OF NEW TRIAL. An order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict will not be disturbed on appeal where there was a substantial conflict in the testimony.

Appeal from a judgment of the superior court for King county, Ronald J., entered March 14, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon promissory notes. Affirmed.

Holzheimer & Herald, for appellants.

Million & Houser and *George Friend*, for respondent.

FULLERTON, J.—The respondent brought this action against the appellants to recover upon a promissory note, executed by the appellant to J. W. McGraw, and by him endorsed to the respondent. The appellants defended on the ground that the notes were obtained by duress and intimidation, and under the fear of a threatened criminal prosecution. A trial was had before the court and jury, wherein a verdict was returned in favor of the appellants. The respondent thereupon moved for a new trial upon various statutory grounds, among which was the ground that the evidence was insufficient to justify the verdict. The court granted the motion on this specific ground, making a recital in his order to that effect. This appeal is from the order granting the motion.

This court has repeatedly, and with emphasis, declared the rule that it would not disturb the order of a trial judge granting a new trial on the ground that the evidence was insufficient to justify the verdict where it could ascertain by an examination of the record that there was a substantial

¹Reported in 119 Pac. 822.

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conflict in the testimony. *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109; *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246; *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798.

The case at bar falls within the rule. The note was executed by McGraw on behalf of himself and his co-maker; and while he testifies, on his direct examination, that he was induced to execute it by threats of prosecution made against him by the payee named in the note, and one of his former attorneys, he is contradicted on this point by both the payee and the attorney. It is true that the payee's testimony appeared by deposition taken prior to the trial, and does not specifically negative the testimony of McGraw, but it gives the payee's version of transactions leading up to the execution of the note, and this is at variance with the statements of McGraw.

But the appellants seem to think that this rule in some way deprives them of their right of trial by jury. In a case triable by jury, where a jury is insisted upon and where the evidence is conflicting, the trial judge has no authority to substitute his own judgment for the judgment of the jury; that is to say, he cannot set the verdict aside and direct a judgment for the losing party, but he may set the verdict aside and order a new trial wherever he believes that the jury have found against the weight of the evidence. How many such new trials he may grant in the same case rests largely in his discretion, but certainly he may continue to grant them until it is reasonably certain that the jury is not likely to return any other verdict.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9962. Department One. December 27, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN RACKICH,
Appellant.¹

EVIDENCE—HEARSAY—PARENTAGE—INDIANS—SALE OF LIQUOR. Upon a prosecution for selling liquor to an Indian of the half blood, the Indian is competent to testify as to his parentage, even though his parents are living.

CONTINUANCE—DISCRETION. In a prosecution for selling liquor to an Indian, it is not an abuse of discretion, after the Indian had testified as to his parentage and that his parents were living, to refuse a continuance until the parents could be called, where it does not appear that they would testify differently.

CRIMINAL LAW—CREDIBILITY OF WITNESS—INDIANS—SALE OF LIQUOR—EVIDENCE. In a prosecution for the sale of liquor to an Indian, the testimony of the Indian is not insufficient to support a verdict from the fact that he was in the employ of the government as an agent in the detection and prosecution of persons selling liquor to Indians.

CRIMINAL LAW—TRIAL—ISSUES, PROOF AND VARIANCE. In a prosecution for selling one quart of spirituous liquors to an Indian, it is not a material variance to prove the sale of one pint of such liquors.

Appeal from a judgment of the superior court for King county, Yakey, J., entered June 18, 1910, upon a trial and conviction of selling liquor to an Indian. Affirmed.

John H. Allen, for appellant.

John F. Murphy and *Alfred H. Lundin*, for respondent.

FULLERTON, J.—The appellant was convicted of the crime of selling spirituous liquor to one Brown, an Indian of the half blood.

On the trial, Brown was permitted to testify, over the objection of the appellant, as to his parentage, stating that his mother was a full-blooded Indian and that his father was a Portuguese. The appellant argues in this court that this

¹Reported in 119 Pac. 843.

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evidence was inadmissible, being but hearsay, and consequently not the best evidence. But we think a person, competent otherwise to be a witness, may testify as to his parentage. While no case has been cited us holding directly that a witness may so testify, analogous cases are numerous. For example, it was held in *State v. Miller*, 71 Kan. 200, 80 Pac. 51, that the prosecuting witness was competent to testify as to her own age, notwithstanding both of her parents were present and testifying to the same fact, and this in a case where the question of her exact age at a particular time was a material question at issue. To the same effect are the following cases: *State v. McClain*, 49 Kan. 730, 31 Pac. 790; *Hill v. Eldridge*, 126 Mass. 234; *State v. Cain*, 9 W. Va. 559; *State v. Best*, 108 N. C. 747, 12 S. E. 907; *Loose v. State*, 120 Wis. 115, 97 N. W. 526; 2 Jones, Evidence, § 303.

So, also, a witness may testify as to the ages of other members of his family. 2 Jones, Evidence, § 303. The principle that permits a person to testify to his own age, or as to the ages of the different members of his family, will also permit him to testify as to his parentage. He acquires the knowledge of the one fact in the same manner that he does the other facts, and while such evidence partakes somewhat of the character of hearsay evidence, it is admissible on grounds of public policy.

The appellant argues further that, since it was shown that the parents of the prosecuting witness were still living, they were the only persons competent to testify to the prosecuting witness' parentage, and that in consequence the evidence admitted was not the best evidence of which the case in its nature was susceptible. But the rule that permits a person to testify as to his parentage is not founded on the principle that it is substitutionary in its nature. On the contrary, it is in itself original evidence. It may be weaker than would be that of the parents themselves, but to permit the one to

testify when the others are within call is not a substitution of evidence; it is no more than the selection of the weaker competent evidence instead of the stronger. To do this, violates no rule of evidence. 1 Greenleaf, Evidence, § 82.

At the trial, and after the prosecuting witness had testified that his parents were still living, the appellant moved orally for a continuance until such time as the parents could be brought into court. The court denied the motion, and the appellant excepted. It is thought that the court abused its discretion in denying the motion, but we think otherwise. There was no showing that the testimony of the parents would have differed from that of the prosecuting witness, nor was there any showing of diligence in attempting to procure their testimony. The court's business must proceed orderly and with dispatch, and interruptions in the proceedings such as was here sought are not to be tolerated unless for the gravest reasons.

It appears that the prosecuting witness to whom the liquor was sold was in the employ of a government agent engaged in the detection and prosecution of persons selling liquor to Indians, and it is thought that this fact rendered his testimony concerning the alleged sale unworthy of belief. But this was for the jury. There is nothing inherently wrong in this method of detecting wrongdoers; in fact, the method resorted to is sometimes indispensable if violators of the liquor statutes are to be brought to justice.

The charge in the information is that the appellant sold to the prosecuting witness one quart of spirituous liquor, while the proof was that one pint of such liquor was so sold. It is thought that this was such a variance as to amount to a failure of proof, but the rule is otherwise. The crime consists in the selling of spirituous liquors, not in the selling of any particular quantity thereof; hence the substance of the issue was proven, which is all that is required.

The other assignments touched upon in the appellant's

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brief seem to have no support in the record. For that reason it is unnecessary that we consider them.

The judgment is affirmed.

DUNBAR, C. J., GOSE, and MOUNT, JJ., concur.

[No. 9747. Department Two. December 27, 1911.]

WESLEY F. COLE, *Appellant*, v. SPOKANE GAS AND FUEL COMPANY, *Respondent*.¹

MASTER AND SERVANT—SAFE APPLIANCES—SIMPLE INSTRUMENTS—ASSUMPTION OF RISKS. The evidence is insufficient to sustain a recovery in an action by a stoker for injuries sustained in the fall of a pan he was carrying by reason of alleged defects in the handle through the loss of rivets, where there was no evidence that such condition impaired its safety, the plaintiff's evidence showed that the handles slipped from his hand, and that from constant use, he had equal means of knowledge as to any defects in the handle; since it was an implement of simple construction which does not come within the rule of safe instrumentalities.

MASTER AND SERVANT—NEGLIGENCE—PRESUMPTION. The doctrine of *res ipsa loquitur* does not go to the extent of raising a presumption of negligence from the mere fact of an injury, but only that certain facts, when established, speak negligence.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 21, 1911, upon withdrawing the case from the consideration of the jury, dismissing an action for injuries sustained by a stoker employed in a gas plant. Affirmed.

W. H. Plummer and Henry Jackson Darby, for appellant.

Post, Avery & Higgins, for respondent.

CHADWICK, J.—Appellant was a stoker in the employ of respondent. He brought this action to recover compensation for injuries which he says resulted from respondent's negligence. The case is predicated upon the legal principle

¹Reported in 119 Pac. 831.

that it is the duty of an employer to provide the servant such safe and sufficient appliances or instrumentalities as are reasonably calculated to insure the safety of the servant, and to maintain them in a reasonable state of repair. Appellant was forty-three years old at the time he was injured, and had performed common labor for many years. He had worked as a stoker for respondent from April 6, 1910, to December 21, 1910, the day he was injured. He with another carried coke along a line or series of retorts, taking it out of one and putting it into another as the process of manufacture required. The vehicle in which the coke was carried was an iron pan with two handles projecting lengthwise from the ends, so that a man could walk between them after the fashion of handling a wheelbarrow. While thus engaged, appellant dropped the pan. It fell upon and fractured his ankle. The specific omission of duty on the part of the employer, as it is alleged, is this: that one of the handles of the pan gave way because some of the rivets were out of the handle, so that it had become loose, and but for this, the accident would not have occurred. At the close of appellant's case, the court took the case from the jury, and thereafter entered a judgment in favor of defendant.

A careful review of the evidence convinces us that there can be no doubt of the correctness of the court's judgment. There is no evidence to sustain counsel's theory that the accident occurred because some of the rivets attaching the handle to the pan were out. Appellant's own testimony does not sustain this theory. He says that the right hand handle slipped in his hand; that he made a "kind of a grab," and that he "grabbed for a new hold," when he lost it altogether. Appellant had used the pan for some time before the accident happened, and it was used for two or three days thereafter. It is not shown by any evidence that the loss of the rivets in any way impaired the usefulness of the instrument. Appellant admits that his gloves were wet, and it is as likely, or more likely, from the evidence that the accident

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happened from this cause rather than any defect in the pan. Or, if it be held that there was a defect, its character was such that plaintiff, who was handling the pan many times a day, would be charged with notice of it, as well as the duty of taking it to the blacksmith who was kept upon the premises by respondent to do all needful repairing. The master could have no more knowledge of such a defect than the servant possessed, for the instrumentality was so simple that it was the duty of the servant to know its condition, and either call the attention of the master to it or protect himself against the possibility of injury. The rule seems well established that an implement of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dullest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects. *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *McMillan v. Minetto Shade Cloth Co.*, 117 N. Y. Supp. 1081; *Wachsmuth v. Shaw Elec. Crane Co.*, 118 Mich. 275, 76 N. W. 497; *O'Brien v. Missouri, K. & T. R. Co.*, 36 Tex. Civ. App. 528, 82 S. W. 319; *Holt v. Chicago, M. & St. P. R. Co.*, 94 Wis. 596, 69 N. W. 352; *Stirling Coal & Coke Co. v. Fork*, 141 Ky. 40, 131 S. W. 1030; *Jenney Elec. L. & P. Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30.

The doctrine of *res ipsa loquitur* is invoked. Under that doctrine it has been held that certain facts, when established, will speak negligence and put the burden of disproving it upon the party charged. It has never been carried to the extent of raising a presumption of negligence from the mere fact of injury. It is the facts from which the injury resulted and not the injury, that sets the doctrine in motion.

Judgment affirmed.

DUNBAR, C. J., CROW, MORRIS, and ELLIS, JJ., concur.

[No. 9917. Department One. December 28, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
HENRY BOWINKELMAN, *Appellant*.¹

HOMICIDE — SELF-DEFENSE — INSTRUCTIONS. Under Rem. & Bal. Code, § 2406, defining justifiable homicide in self-defense where there is reasonable ground to apprehend great personal injury etc., it is not error against the defendant to instruct as to the right of self-defense "if the defendant believes and has reasonable ground to believe" that the killing was necessary to protect himself from great personal danger; as the instruction is more liberal to the defendant than the law, and the "reasonable ground to apprehend" must be such as to produce an honest belief of the existence of danger.

CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS—REQUESTS. Error in failing to give instructions as to the right of self-defense cannot be urged in the absence of any request therefor.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered May 1, 1911, upon a trial and conviction of manslaughter. Affirmed.

Frank A. Luse and *H. J. Snively*, for appellant.

J. Lenox Ward and *Harold B. Gilbert*, for respondent.

PARKER, J.—This defendant was charged by information in the superior court for Yakima county with murder in the first degree, by the killing of John Meeboer. Upon a trial before the court and a jury, the defendant was convicted of manslaughter, from which he has appealed to this court.

Upon the trial, evidence was introduced in behalf of appellant tending to show that the homicide was justifiable, in that it was committed by appellant in lawfully defending himself against an assault made upon him by the deceased. This called for instructions to the jury upon the law of justifiable homicide. Touching the grounds of apprehension of

¹Reported in 119 Pac. 824.

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danger upon which the defendant might kill his assailant, the court instructed the jury as follows:

"A person attacked at a place where he has a right to remain need not retreat, but may repel force by force in a defense of his person against one whom at the time is actually, or apparently, intending or endeavoring, unlawfully, to kill him or to inflict upon him great personal injury, and in such defense the assailed may lawfully meet the attack made upon him in such a way and with such force as under the circumstances he at the moment honestly believes, and has reasonable grounds to believe, are necessary to save his own life or to protect himself from great personal injury; and in such defense the assailed may lawfully kill the assailant, if at the time he is actually or apparently in imminent danger of death or great personal injury at his assailant's hands, and if, under all the circumstances, he honestly believes, and has reasonable grounds to believe, such killing to be necessary to save his own life or to protect him from great personal injury."

This instruction is the same as one approved by this court in *State v. Churchill*, 52 Wash. 210, 100 Pac. 309. It is here conceded by counsel for appellant that, had there been no change in our law relative to justifiable homicide since the deciding of that case, the instruction given in this case would not be erroneous. The new criminal code, which has become the law since the decision of the *Churchill* case, provides as follows:

"Homicide is also justifiable when committed either—(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is." Rem. & Bal. Code, § 2406.

This section defining justifiable homicide, it will be noticed, makes no reference, by specific words, to any belief or apprehension of danger which may exist in the mind of the accused. It is contended by counsel for appellant that the learned trial court erred in making any reference, in the instruction given, to any belief which may have existed in the mind of appellant, thus leading the jury to believe that they might consider such belief in determining appellant's justification, because, as is contended, the belief of the accused is not an element to be considered in determining the right of self-defense under this statutory definition of justifiable homicide. It seems to us that whatever error there may be in this respect in this instruction, is against the state and not against appellant. Instead of putting a greater burden of proof upon appellant to establish his justification, this instruction lessens that burden, if it has any influence thereon, reading the statutory definition literally as counsel insist. From a literal reading of this law, it might be argued that an accused is under no circumstances to be given the benefit of his honest belief as to his danger and that the question of his act being justifiable is to be determined only by the reasonable ground to apprehend danger then existing, as the jury might view it, regardless of the defendant's honest belief relative thereto. The instruction gives appellant the benefit of a more liberal view than this of the law.

Now when we read in this section the words "reasonable ground to apprehend" etc., the question immediately arises, reasonable ground to apprehend by whom? Surely this reference to a reasonable ground of apprehension, must mean a reasonable ground of apprehension by some one at the time the act is committed. It manifestly means reasonable ground to apprehend by the person who is prompted to do the act of defense sought to be justified. It seems to us that it cannot be said that there is "reasonable ground to apprehend," etc. by the accused, unless the ground is such as actually produces in his mind an honest belief of the existence of the

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danger which would justify his act of defense. A ground which would not produce such an honest belief, surely could not be said to be a reasonable ground to justify the taking of human life. Surely it cannot be said that he would be justified by a reasonable ground of apprehension which might be apparent to others when he himself had no ground of apprehension of danger. We think that the instruction here given was not erroneously prejudicial to appellant. He could with better reason complain of the instruction had the court limited it in the respect he is now contending for.

Learned counsel for appellant make some other contentions touching the duty of the court to submit to the jury instructions bearing upon justifiable homicide as defined by subd. 2 of Rem. & Bal. Code, § 2406 above quoted. This we think, however, involves only a question of the court omitting to give instructions for which no request was made. We see no merit in this contention.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and GOSE, JJ., concur.

[No. 9642. Department Two. December 29, 1911.]

BESSIE IDA BLAIR *et al.*, Respondents, v. THE CITY OF
SPOKANE, Appellant.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE METHODS. In an action for the death of a signalman through the fall of a wall, upon which he was directed to stand, the negligence of the city is for the jury, where there was evidence that the wall was unsafe, supports having been negligently removed without putting in proper braces.

SAME—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER. A signalman, injured by the fall of a wall upon which he was directed to stand in giving signals, is not guilty of contributory negligence from mere knowledge of the danger, it being for the jury to determine whether he used care commensurate therewith.

¹Reported in 119 Pac. 839.

SAME—WARNING—QUESTION FOR JURY. Whether a servant was warned of the danger of the fall of a wall upon which he was directed to stand, is for the jury, where there was a conflict in the evidence as to two of the warnings, and the third warning was as to a danger that did not contribute in any way to the accident.

SAME—ASSUMPTION OF RISKS—OBVIOUS DANGERS—DEFECTIVE METHODS. A signalman directed to stand upon a wall does not assume the risks of negligence of the city in failing to adopt a reasonably safe method of doing the work, but only such as are obvious after the city has discharged its duty; and where the city engineer in charge of the work did not anticipate that the wall would fall, it cannot be said that the danger was obvious.

SAME—SAFE PLACE TO WORK—TAKING DOWN STRUCTURES—DUTY OF MASTER. In taking down an unsafe wall, the city owes the duty towards its employees to make the place as reasonably safe as the circumstances and character of the work will permit.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS. Where a signalman takes a position on a wall in obedience to the order of a foreman, it cannot be said that he was so reckless as to bar a recovery.

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE PLANS. Where a city intended to retain a portion of a defective wall, which it was taking down, and such portion fell and killed an employee, in an action for the death, evidence of negligent construction under defective plans authorized by the city is admissible, the evidence justifying a finding that the collapse of the wall was due to the defective plans in the original construction.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered February 18, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the death of a laborer through the fall of a retaining wall. Affirmed.

Cannon, Ferris, Swan & Lally and *A. M. Craven*, for appellant.

Nuzum & Nuzum and *Geo. H. Armitage*, for respondents.

MORRIS, J.—Action by respondents to recover for the death of their husband and father, caused by the alleged negligence of the city. The accident in which the deceased met his death occurred August 25, 1910, through the fall of a

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retaining wall and the slide of a fill on what is known as the Sprague avenue fill. This work had originally been done under contract; but because of the defective methods employed by the contractor, the city had repudiated the contract, and at the time of the accident, was taking out the fill and tearing down the wall in places in order to reconstruct on safer and better plans. The charge of negligence was,

"The said city of Spokane, defendant, acted carelessly and negligently in removing said rocks from the said fill, as aforesaid, carelessly and negligently removed the support from the side of the said fill, as aforesaid, carelessly and negligently failed to put in braces or supports while removing the rock from said fill."

In another paragraph, the original negligent construction was charged under faulty and insufficient plans, and the adoption of faulty plans in taking down the retaining wall and removing the fill. It will thus be seen that the negligence charged consisted in the original faulty plans and construction, and in the negligent methods employed in seeking to remedy the defects in the original construction.

Deceased was a signalman who stood upon the wall or on the fill within a few feet of the wall, to convey signals to the engineer who controlled the operation of the boom and skip that was being used to take the rock and earth from the fill and dump it outside the wall. All of this fill was not to be removed, but only so much of it as was deemed necessary in order to rebuild the wall, which was the main purpose in the reconstruction. This wall as originally constructed was built as a dry wall, stones and rocks being used without mortar, cement, or other binding force. It was five hundred feet long, thirty feet high, fifteen feet wide at the base, and two feet wide at the top. There was abundant evidence to justify a finding by the jury of all the phases of negligence charged in the complaint. It was also fairly established by the evidence that the wall, at the point where deceased either stood upon it, or within a few feet of it, was not to be taken down,

on account of a wing wall coming in at that point to support a street crossing. It is also deducible from the evidence that deceased was directed to stand where he did by his foreman, in order to be in the best possible position to give his signals to the engineer, especially after dark, when his position was within the rays of an arc light where he could be plainly seen and his signals readily comprehended. The accident happened at about 7:30 or 7:45 in the evening. This was amply sufficient to establish the cause of action, unless the right of recovery was lost by reason of the matters set up in defense, which, in so far as the same are here urged, are contributory negligence and assumption of risk. In support of these defenses it was sought to be shown that deceased had full knowledge of the danger confronting him, and that he had been repeatedly warned.

Upon the first point, it is sufficient to say that knowledge of the danger does not of itself constitute contributory negligence in law, and that it is for the jury to say whether knowing the danger the deceased used care and caution commensurate with the danger. This doctrine has been so often announced by this court that further citation is not now necessary. As was said in *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121, and reiterated in *Atherton v. Tacoma R. & Motor Co.*, 30 Wash. 395, 71 Pac. 39:

"The law does not require the plaintiff in an action for personal injuries to be absolutely free from any negligence whatever in order to recover, for such a requirement would impose upon him a duty of exercising extraordinary care and prudence, which is not the standard by which his negligence is measured. All the law requires of the plaintiff, in such cases, is the exercise of ordinary care, under the circumstances surrounding him, and this he may do, although he may be guilty of some slight negligence, in the broadest sense of that term."

Upon the question of the deceased being warned as to the danger, this, under the circumstances developed, was a question of fact for the jury. Three instances are relied upon

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by appellant. One was by a foreman named Jacobs, who testified he warned deceased of danger from the falling wall in the presence of the other foreman Shawgo. This conversation is denied by Shawgo. The second warning relied upon was from Stephenson, the superintendent of the work. Respondent produced a witness who testified that, on the morning of the accident, Stephenson's attention was called to a crack in the wall when a large rock rolled down the slope against it, and that Stephenson told them to keep on working, that the wall was in no danger of falling. The third warning was from the city engineer who says he asked Blair if he did not think he was in a dangerous position, standing with one foot on the wall and the other on the fill, and warned him to be careful of the wall as he didn't think it was very safe. He further testified that he did not think the wall was going to fall, that the principal danger he had in mind was the falling of large rocks weighing from five hundred to one thousand pounds from the top of the wall; but that, outside of the danger of falling rocks, he thought Blair was in a reasonably safe position, and that he did not anticipate the wall itself would fall; if he had he would not have allowed Blair to stand where he did. It will thus be seen that the jury could have found the first two warnings were not given, and that the third was of a danger which did not contribute in any way to the cause of Blair's death, and hence, if given, could not defeat a recovery, based upon a danger the witness himself says he did not anticipate.

As to the defense of assumption of risk, while it is true that an employee assumes all the dangers inherent in the work and that are ordinarily incident thereto, it does not follow that he assumes the risk of his employer's negligence. The risks assumed by the servant are those, and those only, that are obvious after the master has discharged the duty imposed upon him by law of using ordinary care and prudence in making the servant's work reasonably safe, and in providing him with a reasonably safe place in which to do that

work. This is the rule as announced by us in *Howland v. Standard Mill. & Logging Co.*, 50 Wash. 34, 96 Pac. 686, where it was said:

"But it is not the rule that a servant who goes into a dangerous situation assumes the risk of all dangers surrounding the place. He assumes those dangers only which are inherent in and which exist from the nature of the business—those dangers against which there is no absolute protection, not those caused by some negligent act of the master and which would not exist but for such negligent act."

Such is the oft-repeated announcement of the law in other jurisdictions. In *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167, it is said:

"It is the duty of the master to exercise reasonable care, commensurate with the nature of the business, to protect his servant from the hazards incident to it. This duty the law imposes on the master and will not allow him to cast it off. It is contrary to public policy to allow the master to relieve himself by contract from liability for his own negligence. What the law forbids to be done by express contract, it will not assist to be done by implying a contract. A risk which the law, on the ground of public policy, will not allow the servant to assume, it will not imply from his conduct that he has assumed. . . . The servant never assumes the risk of the master's negligence."

So, in *American Window Glass Co. v. Noe*, 158 Fed. 777, the same rule is announced:

"Plaintiff undoubtedly assumed all the risks that naturally inhered in this extrahazardous work, but he did not assume the risk of its being made still more hazardous by defendant's negligence."

Yongue v. St. Louis & S. F. R. Co., 133 Mo. App. 141, 112 S. W. 985, thus expresses the same thought:

"He [the servant] only assumes such risks as are incident to his job after his employer has fulfilled the primary duty of using care to furnish proper working places and appliances."

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Many other cases might be cited to the same effect. The above, however, are sufficient to show the rule properly applicable to the situation confronting us, which, as applied to this case, means that, while Blair could be said to have assumed the obvious risks incident to the situation in which he was placed, he did not assume the negligence of the city in failing to adopt a reasonably safe method with which to do the work, nor in making his place of work extrahazardous in failing to use a reasonably safe plan to dismantle this wall, or to make such slopes in taking out the fill as would add unnecessary and extra hazards to the work. It was the duty of the city in doing this work, confessedly dangerous and attendant with many risks, to do it in such a way as to reduce the danger to a minimum, and not increase it by careless and negligent methods of operation. That it did so increase the danger and add to the risk by faulty and negligent methods, is abundantly established by the evidence.

Again, the deceased met his death because of the falling wall. It would hardly be a just inference to say this was a plain and obvious danger, when the city engineer who knew more about the strength of this wall and the probability of its falling says he anticipated no danger from its fall, nor did he observe any indications that it would fall. The fall of the wall could hardly then be said to be so apparent that the ordinary workman unskilled in matters of this kind would have anticipated it. If it was not obvious to the engineer in charge, it could hardly be said to be obvious to the deceased.

The next contention is that the doctrine of "reasonably safe place" does not apply. It is probably true that, when men are engaged in making a dangerous place safe, the obligation of the master to provide his servant with a reasonably safe place in which to do his work does not apply with all the force that it does in situations where the danger is not so imminent. This only means, however, that the rule is limited in its application. It does not call for its abrogation. Wherever men are engaged in employment, the law

imposes the duty upon the master to make the place as reasonably safe as the circumstances surrounding the place and the character of the work will admit. The master must take some precaution for the safety of his employees. He will not be permitted to say, "This work is known to be dangerous and I am therefore absolved from any legal requirement as to protecting the safety of my employees." The duty is not lessened because, notwithstanding its exercise, the danger remains. The law requires the master shall make the effort, and he cannot be absolved until he does. Having performed this duty as an ordinarily prudent man under the same circumstances would have performed it, he has done his full duty, and his employee then assumes the inherent danger incident to that which he undertakes to do. This feature of the case is so interwoven with the point we have previously discussed that it may be said to rest upon the same legal principle, and that is, the servant does not assume the negligence of the master.

"While it is true that a servant employed to make a dangerous place safe assumes the risk of the very danger which he undertakes to remove, he does not assume the risk of the method employed in doing such dangerous work if that method is unnecessarily hazardous in respects as to which the employee has no knowledge, provided that in these respects the employment could have been rendered less hazardous by the exercise of reasonable care on the part of the employer." *Clark v. Johnson County Tel. Co.*, 146 Iowa 428, 123 N. W. 327.

See, also, *Jacobson v. Hobart Iron Co.*, 103 Minn. 319, 114 N. W. 951; *Wolf v. Great Northern R. Co.*, 72 Minn. 435, 75 N. W. 702; *Bradley v. Chicago, M. & St. P. R. Co.*, 138 Mo. 393, 39 S. W. 763; *Byrne v. Brooklyn City R. Co.*, 6 Misc. Rep. 441, 27 N. Y. Supp. 126; *Norton Coal Co. v. Murphy*, 108 Va. 528, 62 S. E. 268; *Hough v. Railway Co.*, 100 U. S. 218; *Hawley v. Chicago, B. & Q. R. Co.*, 133 Fed. 150; *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058; *Etheridge v. Gordon Con-*

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struction Co., 62 Wash. 256, 118 Pac. 689; *McLeod v. Chicago, M. & P. S. R. Co.*, 65 Wash. 62, 117 Pac. 749.

We have heretofore referred to the fact that the deceased was placed in the position he occupied at the time of the accident by his foreman Shawgo. Under these circumstances, it might well be said, as in *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900, it is reasonable to assume that neither the deceased nor his foreman deemed such a position overhazardous at the time, nor that the danger of such a position was so absolute or imminent that injury must almost necessarily have resulted. Under such circumstances, the master cannot be heard to say that the position deceased was instructed to take was so foolhardy and reckless that he should have refused to obey the instructions of his foreman, and his failure to do so bars a recovery. Such is not the law in this state, as announced in the cases written by us, as cited in the *Withiam* case.

Much is said in appellant's brief concerning the error in admitting evidence of the negligent construction of this wall and fill, and of the instructions of the court in submitting it to the jury. This was not error, in view of the evidence that it was the intention of the city to retain the wall at the point where deceased was standing. Such intention was in itself an assertion that the wall was reasonably safe for the purpose for which it was intended. It further appeared that the plans for the construction were authorized by the city. Such being the case, the city could not escape liability when the evidence justified a finding that the collapse of the wall was due to defective plans in the original construction. Such was the holding in *Potter v. Spokane*, 68 Wash. 267, 115 Pac. 176, in speaking of this same fill with reference to the damage to abutting property.

What we have said disposes of all the errors suggested by appellant, both in the matter of the admission of improper evidence and in the giving and refusal of instructions. It will not be necessary, therefore, to make a more specific ref-

erence to them. Finding no merit in any of appellant's assignments of error, the judgment is affirmed.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 9568. Department One. December 30, 1911.]

J. H. SMITH *et al.*, Appellants, v. FLATHEAD RIVER COAL COMPANY *et al.*, Respondents.¹

CORPORATIONS—SALE OF PROPERTY—INADEQUATE PRICE—RIGHTS OF MINORITY STOCKHOLDERS—INJUNCTION. A prospecting and speculating mining company, organized for the purpose of buying, selling, and trading in real and personal property, will not be enjoined from making a sale of all its property (a lease of coal lands) at an alleged inadequate price, where there was no evidence of fraud, the officers exercised their best judgment, and the sale was ratified by a vote of a majority of the stockholders, and the value of the land was purely speculative; especially where the company was embarrassed financially and unable to prevent forfeiture of the land.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 26, 1910, dismissing, on the merits, an action for an injunction, after a trial before the court. Affirmed.

John M. Gleeson and Joseph F. Morton, for appellants.

Skuse & Morrill, for respondents.

DUNBAR, C. J.—This action was brought by the plaintiffs against the defendants, as trustees, for the purpose of obtaining a permanent injunction to prevent the defendants from disposing of all the company's property, consisting of a lease of 2,896 acres of coal land in British Columbia, at an alleged inadequate price. The defendant company is capitalized for \$200,000, divided into shares of the par value of one dollar each. Appellants are the owners of 35,000 shares. The court granted judgments of dismissal in favor

¹Reported in 119 Pac. 858.

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of the defendants. From this judgment, this appeal is taken, and the granting of the judgment is the substantial error assigned.

From an examination of the testimony, we are of the opinion that the judgment of dismissal was justified. The appellants rely largely upon the case of *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004, but we think that the law announced in that case has no application to the case at bar. That was an application by a minority stockholder, to prevent the disincorporation of the company for the purpose of fraudulently forcing out of the corporation a minority stockholder who would not agree to the disincorporation, the ulterior purpose of which was the organization of another corporation to do the same business, with the petitioning stockholder eliminated; and we held that Bal. Code, § 4275, providing that any corporation may dissolve and disincorporate by application to the superior court upon a vote of two thirds of the stockholders, authorizes a disincorporation only upon a *bona fide* intent upon the part of the people interested to discontinue the business; and does not, as against the objection of a single stockholder, authorize the dissolution of a prosperous company for the purpose of enabling the majority stockholders to get control of the business by a sale of the property and the organization of the new corporation, with the same powers and to continue the same business. The whole record in that case showed a fraudulent intent to pervert the spirit of the law. But we are unable to gather any such intent on the part of the respondents from the testimony in this case.

First, it must be borne in mind that one of the objects of this corporation, as expressed, was to do just what it did do, viz., sell, or contract to sell, its property; for article 2 provides, among other things, as follows: "To buy, own, hold, deal in, mortgage or otherwise lien, and to lease, sell, exchange, transfer or, in any manner whatsoever, trade in or dispose of both real and personal property, and to de-

velop and improve the same." It will thus be seen that it was a speculating and prospecting corporation, and had a right to do what it was attempting to do, if it was not done fraudulently. It might not have exercised good judgment, but it had a right to exercise its best judgment through its trustees and a majority of its stockholders. The contract of sale made with one Davis was ratified at a meeting of the stockholders of the corporation, regularly held for that purpose, at which meeting 180,994 shares of the capital stock of the company were represented and voting, of which 126,663 shares voted for the ratification of the contract and 54,331 voted against it. Outside of a bare insinuation, there is nothing whatever tending to show an attempt to deceive or coerce any stockholder. It was simply a difference of opinion in regard to the value of the leasehold interest which was sold; and while there was some opinion testimony that the price for which the property was sold was entirely inadequate, it must be borne in mind that the land, which was principally valuable for its supposed coal deposits, had not reached the development stage, and that the value was purely speculative, the tract of land comprising 2,896 acres having been developed only to the extent of a tunnel 35 feet in depth with a cross-cut of twenty feet.

It also appeared that the plaintiffs had purchased shares of the capital stock at seven and a half and eight cents per share, which would be a little less than the amount realized on all the shares at the price obtained under the contract. It also appeared that the company was embarrassed financially and unable to meet the requirements of the Canadian government concerning this land, and that the deficit had to be advanced by the president of the corporation to prevent a forfeiture of its rights. There is no showing that the sale disrupts the corporation, or that the proceeds will not be invested in other enterprises consistent with the articles of incorporation. The case, we think, falls squarely

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within the rule announced in *Lange v. Reservation Min. & Smelting Co.*, 48 Wash. 167, 93 Pac. 208.

The conclusion we have reached renders it unnecessary to discuss the third assignment of error, viz., that the court erred in not allowing plaintiffs to continue their case and make Thomas Davis a party.

The judgment is affirmed.

MOUNT, PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9633. Department One. December 30, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. A. M. POLK,
Appellant.¹

INTOXICATING LIQUORS—OFFENSES—ILLEGAL SALES—LOCAL OPTION—ELECTION—EVIDENCE—CLERK'S CERTIFICATE—ADMISSIBILITY. Under Rem. & Bal. Code, § 6297, providing that the result of a local option election may be proved by the clerk's record of the official canvass or by the "official certificate" of the clerk, the clerk's certificate reciting the final result is sufficient and admissible, without a certified copy of the details of the canvass.

SAME—ILLEGAL SALES—DEFENSES—INSTRUCTIONS. In a prosecution for selling liquor in dry territory in violation of the local option laws, it is not error to refuse to give instructions as to defendant's right to sell liquor as a physician, where there was no evidence of such right or any justification for the sale.

SAME—ILLEGAL SALES—EVIDENCE—SUFFICIENCY. The clerk's certificate required by Rem. & Bal. Code, § 6297, is sufficient *prima facie* evidence that local option was in force in the precinct.

SAME—ILLEGAL SALES—EVIDENCE OF SALES—SUFFICIENCY. The uncontradicted statement of one witness that a sale of liquor was made in a town in dry territory, is sufficient to support a conviction of selling liquor in violation of the local option law, although the exact place or boundaries of the town were not shown.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered February 24, 1911, upon a trial and conviction of selling liquor in dry territory. Affirmed.

¹Reported in 119 Pac. 846

Smith & Gresham, for appellant.

Fred T. Neal, *A. W. Barry*, and *C. H. Neal*, for respondent.

PARKER, J.—The defendant was charged with the offense of selling intoxicating liquor in Conconully, a town of the fourth class in Okanogan county on January 21, 1911, while that town was a unit in which the sale of intoxicating liquor was prohibited and unlawful by virtue of an election under the local option law. Upon a trial before the court and a jury, at which the defendant offered no evidence in his defense, he was convicted, and adjudged to pay a fine of \$100 and costs, from which he has appealed to this court.

For the purpose of proving that the sale of intoxicating liquor was unlawful in the town of Conconully at the time charged, the prosecuting attorney offered in evidence the certificate of the town clerk as follows:

“Certificate of Frank Weeks, Town Clerk.

“State of Washington, County of Okanogan, ss.

“I, Frank Weeks, do hereby certify that I am the duly elected, qualified and acting town clerk in and for the town of Conconully, Okanogan county, Washington, a municipal corporation of the fourth class; that I was acting as such clerk at all times during the year 1910. That during said year of 1910, to wit on the 7th day of June, a special election was duly and regularly held in said town, which is in Okanogan county, Washington, for the purpose of determining whether the sale of intoxicating liquors should be permitted within the corporate limits of said town, and at said special election a majority of the legal votes cast thereat were against said proposition, namely 33 votes were cast for the sale of intoxicating liquor within said precinct and 34 votes were cast against the sale of intoxicating liquor in said precinct. In Witness whereof I have hereunto set my hand and affixed the corporate seal of said corporation at Conconully, Okanogan county, Washington, this 16th day of February, 1911.

“(Corporate Seal.)

F. R. Weeks,

“Clerk of the town of Conconully, Okanogan county, Washington.”

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Opinion Per PARKER, J.

The admission of this certificate in evidence by the court, over the objections of counsel for appellant, is claimed to be erroneous. It is insisted that, in order to be admissible, the certificate of the town clerk must be in the form of a certified copy of the record of the result of the election, as appears upon the town records, and not a mere statement of the clerk as to the election and its result. This contention, it seems to us, is answered by the language of the local option statute providing the mode in which such facts may be proven in court, as follows:

“The returns of any such election shall be canvassed in the manner provided by law for other city, town or county elections, and after such canvass the city or town clerk or county auditor, as the case may be, shall publicly certify the result of the election, and shall cause notices of such result to be published in some newspaper circulating in the unit in which the election was held, within ten days after said canvass is completed; and shall record in a well-bound book, to be kept in his office by him and his successors, the result tabulated by precincts of said vote; and said result may be proved in all courts and in all proceedings by such record or by the official certificate of such city or town clerk or county auditor.” Rem. & Bal. Code, § 6297.

It seems to us that the legislature used the words “official certificate,” advisedly. Had it been intended to require proof by a certified copy of the record, it would have been very easy to have so stated in the law. Besides, we may readily find a probable reason for not requiring a certified copy in the fact that, in many of the units for voting upon local option, there are a great many precincts, and the law-makers might well desire to prevent the necessity of producing the original record or a certified copy of the entire record of the tabulated vote by precincts as evidence in every prosecution for a violation of the law. If it be held that this provision as to proof by certificate of the town clerk means a certified copy of this much of the record, as counsel for appellant insist, then why not require a certified copy of every step in the election

proceeding, including the petition for the election, election notice, proof of its publication, etc. When a person is elected to an office, the certificate of his election generally contains a statement of the facts showing his election with no greater particularity than does this certificate show the holding of and the result of the local option election. We have not had our attention called to any authority holding that the usual certificate of election showing a person elected to a public office is not evidence in court of that fact, at least *prima facie*. We think there is no such authority; but, on the other hand, that the admissibility of such a certificate is an elementary rule of evidence. Under a statute in substance the same as this, it has been held in Illinois that a certificate of this nature is admissible to prove the fact sought to be shown here. *People v. Willi*, 147 Ill. App. 207. We conclude that there was no error in the admission of this certificate in evidence.

Several assignments of error are made upon the giving and refusing to give certain instructions by the trial court. Most of these claimed errors have to do with the general contention made by counsel for appellant that the court prevented the jury from considering any right of defense which appellant may have by reason of being a physician. If the law gave to appellant any right to justify the sale because he was a physician, the answer to the contention is found in the fact that he offered no proof upon that question. As we have already noticed, he offered no proof of justification, nor of any other nature. If he had any right to justify his act on this ground, the burden of proof was upon him to establish facts constituting such a defense. *State v. Shelton*, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064; *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037; *Black, Intoxicating Liquors*, § 511; *Joyce, Intoxicating Liquors*, § 686. We express no opinion, however, as to the circumstances under which he might so justify his act as a physician or otherwise, under the law.

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Under the contention that the evidence does not support the verdict, counsel for appellant insist, (a) that the evidence fails to show that the local option law was in force in Conconully, and (b) that the evidence fails to show that the sale took place in Conconully. We have already noticed that the certificate of the town clerk was admissible in evidence, and was at least *prima facie* proof of the unlawfulness of the sale in the town, and there being no other proof on that subject, it was of course sufficient to sustain the conviction so far as that question is concerned. Whether or not the certificate would be conclusive proof of that fact under all circumstances we need not now decide. That the sale took place in the town of Conconully was testified to by one witness, by a general statement to that effect, though the exact place of the sale in the town is not very certain, nor were the corporate limits of the town proven. This being contradicted, and no other evidence offered on that question, it was sufficient in that regard to support the verdict.

What has been said by us disposes of most of the assignments of error, including several not specifically noticed by us. Others are without merit and do not call for discussion.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9731½. Department One. January 2, 1912.]

EDWARD J. DELBRIDGE *et al.*, *Appellants*, v. ALDA I. BEACH
et al., *Respondents*.¹

ATTORNEY AND CLIENT—COMPENSATION — CONTRACTS — VALIDITY—
PUBLIC POLICY—PROMOTION OF DIVORCE SUIT. A contract for the employment of an attorney is void as against public policy and sound morals, where the attorney was to secure evidence to coerce from a husband the largest possible share of his separate property for the benefit of the wife, and if necessary to begin an action for a divorce for that purpose, when in fact the wife had no grounds for a divorce; and the invalidity of the contract is not affected by the provisions of Rem. & Bal. Code, § 474, which leaves the compensation of attorneys to the agreement of the parties, or by the fact that parties to a divorce suit may agree upon a division of their property.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 24, 1910, in favor of the defendants, in an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

William R. Bell, for appellants.

Aust & Terhune, for respondents.

GOSE, J.—This is a suit to recover for services performed upon an oral contract. Demurrers were sustained to the complaint, and a judgment entered in favor of the defendants. The plaintiffs have appealed.

One of the appellants is an attorney at law. The contract relied upon for a recovery is set forth in paragraph 2 of the complaint, as follows:

"That about the 28th day of April, 1909, the defendant Alda I. Beach, entered into a formal oral agreement with the plaintiffs, whereby she employed them to investigate and if possible ascertain whether a certain will, executed by one Elizur Beach, shortly after his marriage with the said defendant, by the terms of which she was devised and bequeathed outright a one-third interest of all the property, real and

¹Reported in 119 Pac. 856.

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personal, wherever situate, of which the said Elizur Beach should die seized or possessed, had been destroyed or nullified by codicil or codicils, or by the execution of a new will; and if any new will had been made or the old will modified, and to ascertain the tenor and contents of such codicil or codicils or such later will; and further, to ascertain the condition of the title to the various tracts of land standing in the name of the said Elizur Beach in the state of Washington and other states at and prior to the time of the marriage of the defendant Alda I. Beach to said Elizur Beach; and further, to ascertain what property had been acquired or disposed of by him since the date of their marriage, and particularly to take all steps and proceedings necessary in the judgment of the plaintiffs to ascertain the intention of the said Beach toward the defendant Alda I. Beach in the matter of the final disposition of his property after his death, and to institute such suits or proceedings as in the judgment of the plaintiffs would secure to her the largest possible share in said estate, and to prevent any disposition of any part thereof adverse to her interest, and if the desired results could not be obtained by any other means, to institute a suit for a legal separation, and as an incident thereto to precipitate a settlement and division of the property rights of the defendant Alda I. Beach and her said husband. That in consideration of such services the defendant Alda I. Beach agreed to and with the plaintiffs to pay all expenses connected with said investigation and with any suits or proceedings which should be instituted, and as compensation to pay to the plaintiffs one-fifth of all money, and to convey to them by a good and sufficient deed an undivided one-fifth of all property turned over to her by the said Beach, whether the money and property so secured should be by voluntary settlement agreement or compromise, devise or bequest, or as the result of a judgment or decree of court."

It is further alleged that, in pursuance of the contract, the respondent Beach paid to the appellant Snyder a retainer of \$100, and advanced to him for his co-appellant the sum of \$475 as expense money; that the appellants entered upon and continued in the performance of the contract until about the 25th day of August, 1909, when the respondent

Beach repudiated the contract and prevented further performance; that, by utilizing the evidence collected by the appellants and their counsel and advice, she has accomplished a settlement and division of the property rights of herself and husband, and has received \$58,666 in money, and real property of large value, a description of which is set forth in the complaint. It is further alleged that, for the purpose of defrauding the appellants, the respondent Beach conveyed the real estate to her co-respondent, and that it accepted the conveyance with knowledge of all the facts and for the purpose of aiding her in the perpetration of a fraud upon the appellants.

Respondents contend, (1) that the contract being oral and having as one of its objects the conveyance of real property, it is within the statute of frauds and void in its entirety, and (2) that it is void as against public policy, in that it is "an agreement to procure evidence for a contemplated divorce action, and an attempt to facilitate the bringing of an action for divorce, not for the purpose of the divorce itself but to force a settlement of property rights between the defendant Beach and her husband."

We think the second contention must be upheld. It is patent that the employment contemplated coercing the husband into a division of his separate property so as to secure to the wife "the largest possible share" therein. The charge is that, if this could be accomplished in no other way, a divorce suit was to be instituted, having for its object a division of the husband's property. There is no averment in the complaint disclosing that the wife had any interest in the property. Under certain conditions, the wife may claim a homestead in the separate property of the husband. These conditions are not shown to exist. Under other conditions, the wife could claim support out of the same character of property. These conditions are not alleged. Nor is it alleged that the wife had any ground for divorce. As was said in *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114

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Am. St. 135, it is the policy of the law to discourage actions for divorce. It is equally the policy of the law to permit one owning property to dispose of it as he chooses, so long as the manner of disposal violates no rule of law or public policy. The law will not permit its processes to be used in a divorce suit or otherwise to coerce a husband into an unwilling division of his separate property with his wife, except where she discloses some legal ground for divorce; and none is shown here.

If authority is needed in support of these views it may be found in the following cases: *Succession of Elliot*, 28 La. Ann. 188; *Speck v. Dausman*, 7 Mo. App. 165; *Barngrover v. Pettigrew*, 128 Iowa 533, 104 N. W. 904, 111 Am. St. 206, 2 L. R. A. (N. S.) 260; 9 Cyc. 519.

In the *Succession of Elliot*, it is said:

"The item of five hundred dollars charged by said attorneys for entering 'upon the business of securing evidence' for a contemplated suit for separation between Elliot and his wife, which was never brought, we do not regard as legitimate; an attorney ought not to recover on such a demand."

In the *Speck* case it is said:

"Courts will never lend themselves to the enforcement of a contract intended to promote the dissolution of marriage. The wife could not contract for alimony whilst the marriage existed; and such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts. If fair and equitable, the arrangement between the parties will receive the sanction of the court. If concealed from the court, their tendency is to produce collusion."

In the *Barngrover* case the plaintiffs, one a lawyer and the other a detective, learning that the defendant's wife was about to commence an action for divorce from the defendant, informed the defendant of that fact, and before the commencement of the divorce suit entered into a written contract

with the defendant, whereby they agreed "to prepare evidence" and try the cause prosecuted against him by his wife, and "to furnish proof" in the trial of the case of the wife's infidelity and to secure a divorce on his cross-petition to be filed in the suit for a stipulated compensation, to be paid when the divorce was procured on the cross-petition or upon the compromise of the suit by the defendant. The complaint, after setting forth the matters stated, alleged that the divorce suit had been compromised, and that the wife had been permitted to secure a divorce without opposition. A recovery was prayed, both upon the contract and upon a *quantum meruit*. The court denied relief upon both grounds, saying:

"The clearly expressed object of the agreement was to bring about a dissolution of the marriage contract and to put an end to the various duties and obligations resulting from it. It is therefore against sound public policy and void. The marriage relation is sacred, and one which the law will encourage and maintain when formed. Its dissolution will not be left to the caprice of the parties themselves, nor will it be permitted to rest on the interference of strangers. Hence any agreement conditioned on the obtainment of divorce, or calculated to facilitate its obtainment, is void. Such is the settled policy of the law as expressed in the universal rule adopted by the courts."

It is a well-settled principle of law that agreements against public policy and sound morals will not be enforced by the courts. *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Brown v. First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404; *Cascade Public Service Corporation v. Railsback*, 59 Wash. 376, 109 Pac. 1062.

In the *Brown* case it is said:

"It follows, to state the rule comprehensively, that all agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the

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full and impartial course of justice therein, are void, though not open to the charge of actual corruption. 3 Am. & Eng. Enc. Law 879-881; Bish. Cont. § 549. And this is true regardless of the good faith or intent of the parties at the time the contract was entered into, or the fact that no evil resulted by or through the contract."

The appellants rely upon the provisions of Rem. & Bal. Code, § 474; *Smits v. Hogan*, 35 Wash. 290, 77 Pac. 390; *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. 135, and *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876. The code provision is as follows:

"The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties," etc.

In the *Arthur* case it is said that this provision applies to actions for divorce as well as to other actions. Neither the provision of the code nor the cases cited apply to the facts at bar. It cannot be doubted that a party having meritorious ground for divorce may agree with an attorney upon the measure and mode of compensation for his services in a divorce action. Nor can it be doubted that, under like conditions, the husband and wife may agree upon a fair and reasonable division of their property, where there is no arrangement for a collusive decree. *Long v. Long*, 38 Wash. 218, 80 Pac. 432. But these principles do not aid the appellants. The case must be controlled by the legal effect of the services contracted for, and not by the good faith of the appellants in entering into the contract. We express no opinion as to whether the contract contravenes the statute of frauds.

The demurrers were rightfully sustained, and the judgment is affirmed.

DUNBAR, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9748. Department Two. January 3, 1912.]

W. F. ADAMS *et al.*, *Appellants*, v. JOHN L. CANUTT *et al.*,
Respondents.¹

SPECIFIC PERFORMANCE—COMPLAINT—SUFFICIENCY. A general allegation in a complaint for specific performance that the plaintiffs have performed all of the agreements on their part to be performed, is sufficient, as against a general demurrer, to show that specific provisions of the contract had been complied with.

EVIDENCE—JUDICIAL NOTICE. The courts take judicial notice of the rules and practice of the Interior Department.

TRUSTS—AGREEMENTS—CONSTRUCTION—DUTY OF TRUSTEE—SPECIFIC PERFORMANCE. Under the rule of liberal construction of trust agreements to effectuate the intent of the parties, where an assignment of a state land contract to a bank as trustee authorized the state to receive from the bank the performance of the contract, the trustee to receive the deed from the state when the parties shall have made full payment, and to execute deeds of different portions of the lands to the respective parties interested in the trust, it is immaterial whether the parties make payment for the lands direct to the state or to the bank; and upon payments to the bank as trustee, it is the duty of the trustee to perform the state contract, receive the state deeds and fully execute the trust; and the bank cannot defeat specific performance on the theory that it acted only as agent in receiving the money.

TRUSTS—AGREEMENT—AMBIGUITY—EVIDENCE—PAROL EVIDENCE TO EXPLAIN WRITING. In such a case, the trust being admitted, parol evidence is admissible to make certain any of the uncertain, incomplete, or ambiguous terms of the assignment to the trustee; and the oral agreement of the trustee to make payments to the state, upon payment to it, does not contradict the terms of the trust.

SPECIFIC PERFORMANCE—DEFENSES—PLEADING. In an action for specific performance, in which the complaint alleged performance by the plaintiff of all the conditions of the contract upon its part to be performed, nonperformance of conditions is matter of defense, and cannot be urged on general demurrer to the complaint.

Appeal from a judgment of the superior court for Whitman county, Neill, J., entered April 26, 1911, dismissing an

¹Reported in 119 Pac. 865.

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action for specific performance, upon sustaining a demurrer to the amended complaint. Reversed.

Pattison, Stotler & Pattison, for appellants.

J. T. Brown and Chas. R. Hill, for respondents.

CHADWICK, J.—In 1905, defendants Canutt entered into a contract with the state of Washington for the purchase of certain school lands. On January 30, 1908, Canutt and wife entered into a written contract with Frank H. Endsley, whereby they agreed to sell Endsley a fractional part of the lands. Endsley paid them the sum of \$1,004.94 in money, and agreed to meet all balances due and to become due to the state upon the principal contract. There were other covenants with reference to the occupation and use of the land, not now necessary to be considered. In order to carry out the agreements of the parties and to effect a final division of the land, a written contract was executed, the material parts of which follow:

“The purchase price of said property is the sum of \$7,-404.94, which the party of the second part agrees to pay the parties of the first part as follows: the sum of \$1,004.94 cash upon the signing and delivery of this agreement, the receipt of which is hereby acknowledged and the balance of said purchase price to be paid as follows: . . . It is further agreed that the parties of the first part will pay all taxes or assessment levied or assessed against said premises for the year 1906 and previous years and the party of the second part will pay all taxes levied or assessed against said premises for the year 1907 and subsequent years. . . . It is further understood and agreed by and between the parties hereto as part of the consideration of this agreement that the party of the second part will farm said lands in good and farmer-like manner during each and every year of this agreement until the full purchase price and interest has been fully paid, and that the title to an undivided one-third of all crops raised upon said premises during each and every year of this agreement is and shall remain in the parties of the first part until the payment of the interest and principal due on said

contract with the state of Washington then due shall have been paid. It being the intention of the parties hereto that at least one-third of said crops clear of all expense shall be applied during each year of this agreement towards the payment of the sum due the state of Washington upon said contract. If the party of the second part fully, faithfully and promptly pays said sums of principal and interest due on said contract with the state of Washington, according to the terms of said contract or any extension that the state may grant, subject to the conditions hereinbefore expressed, and shall pay said taxes as herein agreed, and shall fully and faithfully comply with all of the terms of this agreement to be by him performed, then the trustee, hereinafter named is authorized and directed to procure a deed to said lands and premises in the name of said trustee and execute a deed to the lands herein agreed to be conveyed to the party of the second part and to execute a deed to the remainder of said lands to the parties of the first part. If the party of the second part should fail or neglect to fully and faithfully comply with all the conditions herein expressed to be by him performed promptly at the times herein stated, time being the essence of this agreement, then the parties of the first part are released and discharged from all obligations in law or in equity to convey said premises, or any part thereof, and all payments made shall be kept and retained by the parties of the first part as liquidated damages and as rent for the use of said premises. It is understood and agreed that the parties of the first part will make, execute and deliver to the Farmers State Bank of Colfax, Washington, as trustee, an assignment of said contract with the state of Washington, to be by said bank held as trustee to carry out the terms of this agreement, and if the party of the second part should fail or neglect to fully comply with the conditions of this agreement to be by him performed as herein set forth, said bank is authorized and directed to reassign and redeliver said contract to the parties of the first part."

The following assignment was attached to the principal contract:

"John L. Canutt and Nettie E. Canutt, his wife, the within named purchaser, for and in consideration of the sum of one (\$1.00) dollar, to them in hand paid by Farmers State Bank,

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a corporation, trustee, of Colfax, county of Whitman and state of Washington, hereby sells, assigns and transfers all their rights, title and interest in and to the within contract and the lands therein described unto the said Farmers State Bank its assigns forever, and we do hereby authorize the state of Washington to receive from said bank the performance of all covenants and agreements in said contract specified to be performed by the party of the second part, and upon such performance to execute to it a patent as it would have been executed to me had this assignment not been made. And Farmers State Bank said assignee, hereby covenants and agrees to keep and perform all the covenants and conditions specified in said contract to be performed by the party of the second part. Given under our hands and seals this 30th day of January, A. D. 1908.

"John L. Canutt,

"Nettie E. Canutt,

"Farmers State Bank of Colfax, Wash.

"P. B. Stravens, Pres.

"P. O. Address, Colfax, Wash."

Thereafter Endsley, for a valuable consideration, sold all his right and interest in the land to plaintiffs Adams, who, on the 27th day of October, 1909, tendered to the Farmers State Bank the full sum due on the contract, and demanded that it procure a deed to the lands in controversy and convey to them the part they were entitled to. This the bank refused to do, because the Canutts had on the 20th day of October, served notice upon it that they had declared the contract forfeited and no longer binding upon them. This action was brought to compel specific performance. It was the view of the trial court that the complaint did not state a cause of action, because it was not made to appear that Endsley or these plaintiffs had paid the sums due on the contract to the state of Washington; that a payment to the bank would not be a payment to the state, and that, if payments had been made to the bank, the bank would become an agent merely of appellants to transmit the money. The court further held that the contract was subject to forfeiture; or, to use the words of the trial judge, the complaint could not

be made to state a cause of action. Accordingly a demurrer was sustained, whereupon plaintiffs filed an amended complaint, wherein it is alleged:

"6th. That on the said 30th day of January, 1908, said plaintiffs, John L. Canutt and Nettie E. Canutt, his wife, and defendant Frank H. Endsley, delivered to the Farmers State Bank of Colfax, Washington, a corporation, the original said agreement and said bank accepted the same and covenants and agreed to keep and perform all of the covenants and conditions specified in said contract to be performed by the said John L. Canutt, and said bank agreed upon the receipt of the payments due the said state of Washington, as set forth in said contract to forward the same to the state of Washington, and procure a deed for said lands in accordance with the terms and conditions of the aforesaid agreement."

It was also alleged, as it had been in the original complaint:

"13th. That plaintiffs having complied with all of the agreements to be by them performed are entitled to have said defendant Farmers State Bank perform said agreements to be by it performed."

Upon demurrer, the trial judge was still of the opinion that, considering the contracts and assignment, which were made a part of the pleadings, there was no obligation on the part of the bank to receive and transmit the fund, and that he could not decree that it should do so, it nowhere being alleged that appellants or their assignor had paid or tendered payment to the state. He further held that there was nothing for the trustee to do until payment had been made to the state by the plaintiffs or their assignors, and that paragraph 6 of the amended complaint above quoted could not be considered in the light of the writings, which, in his judgment, negatived the bare allegation that the bank agreed to receive and transmit the money. The court was of the further opinion that the complaint lacked in other particulars, that it did not allege that certain taxes and sums agreed to

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be paid the Canutts had been paid, and that the land had been farmed in a proper manner. We think that paragraph 13 of the complaint sufficiently covers this point, as against a demurrer, and will proceed to a discussion of the main issues.

It occurs to us that the vice of the trial court's reasoning lies in this, that he is inclined to treat the trustee as a principal; whereas this controversy must be decided upon the equities existing between Canutt and Endsley and his assignees. When so considered, we think the amended complaint, as well as the original complaint, states a cause of action. The bank has answered that it has no interest except as defined by the assignment, and that it is willing to abide any order the court may make, and perform any duty that may be put upon it. The assignment to the bank was made with reference to the agreement between the Canutts and Endsley, and that agreement was made with reference to the law as it existed at the time. It is a fundamental rule that writings in which trusts are declared are to be construed liberally in order to effect the object of the parties concerned; that the intention of the parties affords the only sure test for construing the deed a contract creating an express trust, and that technical constructions are not favored. *Porter v. Bank of Rutland*, 19 Vt. 410; 28 Am. & Eng. Ency. Law (2d ed.), 991; 1 Perry, Trusts (4th ed.), § 95.

The only parties who have an interest in this trust are the parties to the contract of sale, and the first inquiry should be, what was their purpose, rather than what was the means adopted to accomplish that purpose. It was the intention of the Canutts to sell all of a certain section of land except a certain part lying south of a county road. An assignment of any part thereof less than the whole, unless described by government subdivisions, could not be entered at the state land office. (We take judicial notice of the rules and practice of that department.) To secure both parties,

the title, in so far as it was controlled by the contractee, was put in the Farmers State Bank, under the terms following:

"We do hereby authorize the state of Washington to receive from said bank the performance of all covenants and agreements in said contract specified to be performed by the party of the second part."

As we read this contract, we are unable to agree with the trial judge in his ruling that "there is nothing for the trustee to do until all the payments have been made and all other conditions have been complied with." This would be equivalent to holding that the bank was to do nothing but execute the deeds. To so hold ignores its agreement to keep and perform all the covenants of Canutt's contract with the state, to receive a deed upon full payment, and Canutt's command to the state to receive from the bank the performance of all his covenants, the most material of which is the promise to pay the purchase price. But if an agreement to receive and pay the money over to the state is not expressed, it is certainly to be implied as a part of the bank's obligation. To hold otherwise would be to make the manner and form of payment to the state, not merely material, but controlling; whereas, considering the design of the parties, it was and must be now so held of no consequence to the Canutts whether the payment to the state was made by the bank, Endsley, or these plaintiffs, so long as his obligation was discharged.

Furthermore, there being no question as to the creation of a trust, the assignment, which in this case is the trust instrument, is to be construed in the light of the object sought to be obtained; and to that end if it be held that the assignment is uncertain, incomplete, or ambiguous, parol evidence may be received to show the situation and circumstances surrounding its execution. Or, to restate the proposition, while an express trust in lands (assuming that the bank is a trustee of lands) cannot be proved by parol, the trust being established, parol evidence will be received to make the instru-

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Syllabus.

ment certain if it be uncertain, or to show its terms, to the end that the true purpose of the parties in interest be not defeated. *Beach, Trusts*, 758; *Reid v. Reid*, 12 Rich. Eq. (S. C.) 213; *Hinckley v. Hinckley*, 79 Me. 320, 9 Atl. 897; *Nesbitt v. Stevens*, 161 Ind. 519, 69 N. E. 256. Under this rule, paragraph 6 of the amended complaint makes the complaint state a cause of action, although it be held that the original did not.

It was urged upon the argument of this cause, and is suggested in the brief, that appellants and their assignor have failed to meet other covenants and conditions of their contract. If so, it may be shown in defense of this action. We are not holding that there may not be a defense, but merely that the complaint before us states a cause of action and entitles the appellants to be heard in a court of equity.

Reversed, and remanded with instructions to overrule the demurrer.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9542. Department Two. January 3, 1912.]

HARVARD INVESTMENT COMPANY, *Appellant*, v.
LORETTA SMITH *et al.*, *Respondents*.¹

LANDLORD AND TENANT—RENT—LIABILITY OF ASSIGNEE AFTER RE-ASSIGNMENT. The assignee of a lease, under an unqualified consent by the lessor, may reassign the lease for the purpose of ridding herself of liability to the lessor for rent accruing thereafter, although she had agreed with the original lessee on accepting the assignment to perform all the covenants and obligations in the lease.

SAME. Where the landlord gave an unqualified consent to the assignment of a lease, the assignee is liable for rent only during occupancy, and upon reassigning the lease, there is no consideration for a reservation whereby the landlord consented to the reassignment on condition that the first assignee should remain bound for the rent; and hence all subsequent assignees are liable for rent only during occupancy.

¹Reported in 119 Pac. 364.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 14, 1911, upon findings in favor of the defendants, in an action for rent, after a trial on the merits before the court without a jury. Affirmed.

Byers & Byers, for appellant.

Emerson H. Carrico and Pierre P. Ferry, for respondents.

CHADWICK, J.—The main point in this case is whether the respondents are bound by the terms of a written lease made by the appellant to one Mary A. O'Reilly. The original lease was made for a term beginning October 1, 1907, and ending September 30, 1910. By it, O'Reilly became bounden to pay the full sum of \$16,150, payable, after the first month's rental of \$400, at the rate of \$450 per month. It was further covenanted and agreed that O'Reilly would not assign the lease, or any interest therein or any part thereof, without the written assent of the appellant, or its "agents, had and obtained thereto." On May 16, 1908, O'Reilly, with appellant's consent, assigned all of her interest in the lease to respondent Belond, who signed the following: "I hereby accept the above assignment and agree to all the conditions of the within lease and promise to perform all its covenants and obligations." An absolute consent without reservation was given to this assignment. In February, 1909, Belond assigned to respondent Loretta Smith, a married woman. Smith and her husband signed an acceptance in the same form. On the same sheet of paper which is attached to the lease, we find the following consent:

"Consent is hereby given to the assignment of interest of Elizabeth Belond in the within lease to Wm. J. Smith and Loretta Smith, but it is expressly understood that said Elizabeth M. Belond is not released from any of the covenants of said lease, but remains bound as if this assignment and contract had never been executed, and neither this consent nor the receipt of rent from said assignee shall be construed as a release. [Signed] Dexter Horton & Co., Assignee, by West & Wheeler, Agent."

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Thereafter, by like assignment, acceptance, and consent, Mrs. Smith assigned to one Jarnigan. Jarnigan went into possession, but remained only a few days when, to protect their own interest, the Smiths re-entered and held possession until May 10, 1910, when their interest was assigned to M. P. Blum. This assignment was never formally accepted by Blum, nor was written consent given by the owner, although Blum went into possession and so remained for a period of two days when, on account of differences with the Smiths culminating in litigation, he threw up his possession. No rent has been paid since May 10, 1910, and this action is brought upon the covenants of acceptance and consent, to recover from Belond and Smith the rent for the remainder of the month of May and rent due June 1, 1910.

We think there can be no question as to the correctness of the judgment in favor of Belond. The assignment to her, as well as the consent of the owner, was absolute. She could not be thereafter bound to pay rent for the full term by a contract less formal than that which bound her assignor. *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102, is decisive, and for the reasons therein stated, the judgment as to Belond is affirmed.

It will be noticed that the consent to the assignment to Mrs. Smith is in the same form. The reservation in the consent that Mrs. Belond is not released from the covenants and conditions of the lease would not enlarge her undertaking or be held binding beyond the term of her occupancy, unless she had consented thereto. Of this there is no evidence. So the same rule of law would relieve the Smiths from the payment of rent under the lease after their assignment to Jarnigan.

It is unnecessary to notice the further contention of respondents Smith that the reentry after Jarnigan's abandonment without assignment or consent was independent of the lease, and made them tenants from month to month. It is enough that they are liable under the terms of their contract

only for the time the property was occupied by them, and are relieved of the obligation to pay rent by assigning the lease with consent of the owner without express agreement to be further bound. Under all authority, the assignment of the lease terminates the privity of estate existing between the assignor and the grantor, and the privity is transferred to the assignee. And on principle it should be so. The owner has it in his power to control the tenancy. If he desires to hold the original lessee or any assignee, he may do so by withholding his consent, or consenting to a sublease; or, in the event of an assignment, make his consent conditional, so that in the event of a reassignment the one taking possession will be bound to pay rent for the full term. The possession would then furnish a consideration for the promise. But when the intent to hold the assignor is manifested in a consent to an assignment to a new party at the time the assignor is going out, there is no consideration to support a promise to sustain the reservation.

This conclusion makes it unnecessary to discuss the other propositions advanced by respondents to sustain the judgment of the lower court. Judgment affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

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Statement of Case.

[No. 9674. Department Two. January 4, 1912.]

W. J. MARTIN, *Respondent*, v. SAMUEL HILL, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE OF MASTER—LACK OF SUPERINTENDENCE. Where the work of taking down a gin pole was in charge of a foreman, who released a guy rope supporting the pole while men attempted to catch and hold it, the work was such as to require careful superintendence, rendering the master liable for lack thereof, whether the fall of the pole after it reached a certain angle was due to the laws of gravitation or to a panic of the men who were to support the pole.

SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—EVIDENCE—SUFFICIENCY. A carpenter does not assume the risks and is not guilty of contributory negligence, as a matter of law, in responding to a request to lend a hand in taking down a gin pole, so as to preclude a recovery when the pole fell through lack of superintendence, on the release of a guy rope, either by the laws of gravitation or by the panic of the men, especially where other skilled men accepted equal risks.

SAME—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY—WARNING. A servant is not precluded from recovering from the fact that he did not save himself in an emergency on a warning to "look out," where he attempted to do so, although others more favorably situated got out of danger.

SAME—FELLOW SERVANTS—ACT OF SUPERINTENDENCE. Where the work of taking down a gin pole required con-association and concert of action and could not proceed safely without supervision, the master is liable for the want of proper supervision, and one selected by him to control the matter is not a fellow servant of the men assisting in the work.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$4,495.95 for injuries sustained by a carpenter through the fall of a gin pole is not excessive, where he suffered a compound fracture of the leg, which was shortened, he was confined to the hospital from April 6 to September 6, and suffers constant rheumatic pains; although he was able to go to work in January at four dollars a day, having formerly earned five dollars a day.

Appeal from a judgment of the superior court for King county, Main, J., entered March 4, 1911, upon the verdict of a jury rendered in favor of the plaintiff, for the sum of

¹Reported in 119 Pac. 849.

\$4,495.95, in an action for personal injuries sustained by a carpenter engaged in the construction of defendant's house. Affirmed.

McCafferty, Robinson & Godfrey, for appellant.

James T. Lawler, for respondent.

CHADWICK, J.—Plaintiff, who is a carpenter, was engaged in taking down forms on a house built of concrete. The house was owned by the defendant. A gin pole had been set up on the roof of the building; and having performed its office, the carpenter's foreman, one Thompson, said in the presence and hearing of several workmen engaged on or about the roof, "Come, boys, and give us a hand to take down that gin pole." Plaintiff left his task and with others prepared to assist in lowering the pole, which was some thirty-five feet high and made up of sections of rolled iron pipe, six inches in diameter at the bottom and about four inches at the top. The number of men on the roof, and whether all of them lent a hand, were disputed questions of fact; but it is certain that plaintiff stooped down and took hold of the pole near the bottom to hold it in a frame or seat made of two by four scantling, so as to keep it from slipping. One workman, and possibly two others, took positions so as to reach the pole as high up as possible so as to let it down gradually. Others held two guy ropes that had been used to hold the pole in place. These ropes performed no office other than to steady and direct the pole as it was lowered. Thompson went down to man the main guy rope, which was attached to a telephone pole on the street and about seventy-five feet away. The weight of the pole was upon this guy rope. When he started to lower the pole and it had come to an angle of about forty-five degrees, one of the workmen said, "Look out. Let go," and all of those engaged let go of the pole with the exception of the respondent who was caught under it, and he suffered a compound fracture of the lower limb.

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It is alleged that the foreman, "without warning, completely released the guy rope which he was handling, thereby causing said gin pole to fall with great force, and in doing so it came in contact with plaintiff's leg in proximity to the ankle joint, breaking the same, and causing the damages hereinafter complained of."

Appellant attacks the sufficiency of the complaint and the evidence, and, as he well says, the same principles of law govern both contentions, and then proceeds to discuss them together. It is contended that there was no evidence to sustain the allegations that appellant's foreman "wholly released the head guy rope." Whether those on the roof could see the foreman when releasing the rope was a disputed fact, and we think it may be conceded that there is no positive testimony to the effect that the guy rope was purposely released. It was the contention of the appellant, upon the trial and here, that the rope was not in fact released, but following the natural law of gravity, it fell of its own weight when it reached a sufficient angle, and that those who undertook to sustain it became panic stricken and released their support; otherwise the accident would not have happened.

But it seems to us that the legal consequences would be the same whether the foreman released the guy rope or it fell when it reached a point where the law of gravity intervened to thwart the plans of those engaged in the work. Having assumed to release and pay out the guy rope, knowing that the weight of the pole would be upon it, it was the duty of the foreman to exercise due care to protect those who had complied with his request to lend a hand; or, if the other theory be adopted, then we are of the opinion that the character of the work was such as to call for a more careful superintendence on the part of the appellant. In the case of *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481, a somewhat similar contention was made; that is to say, that the accident occurred as the result of a

violation of a natural law, and that by the exercise of those faculties with which all men are endowed, the danger might have been foreseen and avoided. We there said:

"It is true that, as viewed by learned counsel and by those versed in the laws of mechanics, the result might have been expected as a consequence of the violation of natural laws. But it is not to be expected that a common laborer will have knowledge of, or be bound by, natural laws, unless they are so obvious as to prompt the instinct of self-preservation in men of ordinary prudence and understanding."

This case is even stronger than the *Engelking* case; for, although respondent be charged with a knowledge of the law of gravitation, his apparent assumption that those who stood up to receive the pole as it came down would be able to hold it and lower it without danger to him was made an issue for the jury to decide.

Nor can we agree with counsel for appellant that the affirmative defenses were so made out as to warrant the court in setting aside the verdict of the jury. It may be true that respondent was not bound to comply with the request to lend a hand, but it does not follow that, because he did so, he is to be charged with contributory negligence. The work of the master was at hand. The evidence shows that Thompson laid out the work and directed the men, and it is the common experience of mankind that in building houses and in the prosecution of work of like character, there is a time when artisans and mechanics are called upon to act in common or in concert, to do that which one or even a few men could not do. When obedience is the natural thing to do, men who obey will not be held to be volunteers. To hold that one who so acts is *prima facie* guilty of contributory negligence (and that would be the legal effect of such holding) would be to ignore that impulse which prompts men to help others, and to put an unwarranted burden upon the builder; for if such work is to be held to be extra work requiring

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extra men, the harshness of the rule would fall in the end upon the owner rather than the employee.

Nor is respondent to be charged because he did not get away or save himself when some one gave the warning to "look out." The fact that others did save themselves is not evidence in itself conclusive that he might have done so. It will be remembered that respondent was in a stooping position, and had not the advantage of the others who were on their feet. But there is evidence tending to show that he did attempt to save himself. Hence this issue is foreclosed by the verdict, for whether he might have done so is a relative question which has been decided in his favor.

Appellant insists that the danger was open and obvious, and that respondent cannot recover because he assumed the risk. Whether the danger was such that a man of ordinary prudence would have refrained from doing the work was a question for the jury, to be determined in the light of all the evidence. An assumption of risk involves a mental process, or a charge of it, which may be likened to notice, express or implied. It must appear that the danger was in fact known and appreciated, or that its character was such that a man of ordinary prudence would, in the exercise of the instinct of self-preservation, have refused to assume it. The fact that three, or possibly more, men, all mechanics, some of whom were witnesses (and they seem to be men of intelligence) put themselves in positions of almost equal danger, would in itself seem to be enough to show that a court would not be warranted in holding as a matter of law that respondent had assumed the risk. *Engelking v. Spokane, supra.*

The defense of fellow service is not to be found in the evidence. There was no con-association, although there was concert of action. As said in *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369:

"But the work was of such a character as to require concert of action on the part of the several workmen engaged in its performance, and could not proceed with any degree

of efficiency without the immediate and direct supervision of someone. When the master, therefore, took the burden upon itself of selecting such a supervisor, it became responsible for the acts of the person so selected, and if he performed his duties negligently, it became responsible to any one injured by such negligent performance. *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400."

So in the case at bar, there was a lack of proper superintendence when the character of work was such as to demand it. Respondent had no opportunity of knowing whether Thompson was performing his work in a careful manner, and no control over his action. The safety of the act depended primarily upon the manner in which the line was paid out, and the case naturally falls within the rule that the question of fellow service will not be resolved by measuring the rank of the employees but by the character of the act itself. We find that the offending employee was engaged in the performance of the master's duty or charged therewith in reference to the act out of which this controversy arose, and that he is not to be denied a recovery under the rule of fellow servant. *Jackson v. Danaher Lumber Co.*, 53 Wash. 596, 102 Pac. 416.

We think this disposes of all the contentions of appellant excepting the one that the damages allowed are so excessive as to warrant the assumption that they are the result of passion and prejudice. Respondent suffered a compound fracture of the leg, was confined in the hospital from April 6 to September 6, his limb is shortened from one-fourth to three-eighths of an inch, and he suffers rheumatic pains which he says are constant, but which will not, so far as the evidence shows, prevent him from working at his trade. Respondent was able to resume his ordinary occupation some time in January following the accident, when he found employment at the rate of four dollars per day. He was earning five dollars per day when injured. Allowing \$1,000 for loss of time, he is

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entitled to compensation for pain and suffering, and to cover the permanence of his injury. The recovery as allowed by the court is liberal, even generous, as it seems to us; but a review of the cases convinces us that it is not so disproportionate to the amounts allowed to stand in many of our decisions, considering a similar state of facts, that we would be warranted in substituting our judgment for that of the lower court. While it is not a hard and fast rule, yet the inclination of the court has been generally to follow the judgment of the trial judge in matters of this kind. *Smith v. Seattle Elec. Co.*, 61 Wash. 175, 112 Pac. 87; *Cox v. Wilkeson Coal & Coke Co.*, 61 Wash. 343, 112 Pac. 231; *Nelson v. Western Steel Corp.*, 61 Wash. 672, 112 Pac. 924. The case at bar is somewhat analogous to *Smith v. Hewitt-Lea Lumber Co.*, 55 Wash. 357, 104 Pac. 651, where we allowed \$4,000; *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46, 31 Pac. 411, where \$5,000 was allowed, and *Mueller v. Washington Water Power Co.*, 56 Wash. 556, 106 Pac. 476, where we allowed \$5,250 to stand.

Finding no reversible error in the record, the judgment is affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9705. Department One. January 4, 1912.]

SADIE SILVERSTONE *et al.*, Appellants, v. ANTHONY HARN
et al., Respondents.¹

TAXATION—FORECLOSURE—WANT OF PROCESS. A tax foreclosure proceeding without the service of any process is without jurisdiction and void.

EMINENT DOMAIN—AWARD OF DAMAGES—PARTIES ENTITLED—DECREE—DEFAULT OF TRUE OWNERS. In condemnation proceedings, when all persons interested in or claiming title to the land were duly served, and the true owners defaulted, and a trial of the issues was had between the relator and certain claimants, the relator is not charged with errors in determining who were the parties entitled to the award, and an award to such claimants and a decree adjudging that they are the true owners of the land is not void as to the relator, who acquired title to the land upon payment of the award to the clerk of the court, as provided by Rem. & Bal. Code, § 929.

SAME—PARTIES ENTITLED—GRANTEE OF OWNERS AFTER AWARD. The final decree in condemnation proceedings effects an involuntary sale of the land, and a subsequent deed by the owner conveys nothing; since the title was divested by the payment of the award and the subsequent deed did not operate as an assignment of the award, where it contained no apt words of assignment.

QUIETING TITLE—COMPLAINT—SUFFICIENCY. The complaint in an action seeking equitable relief to set aside certain proceedings is insufficient as a suit to quiet title to the land where it contains no proper description of the land.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 19, 1911, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief. Affirmed.

Edward Judd, for appellants.

Vince H. Faben and *Elias A. Wright*, for respondents Harn.

Bogle, Merritt & Bogle, for respondent Oregon and Washington Railroad Company.

¹Reported in 120 Pac. 109.

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Opinion Per FULLERTON, J.

FULLERTON, J.—This is an appeal from a judgment of dismissal, entered after a general demurrer had been sustained to the plaintiffs' amended complaint, and after the plaintiffs had elected to stand thereon. The ultimate question for decision therefore is, does the amended complaint state facts sufficient to constitute a cause of action.

In brief, it is alleged in the complaint, that one John P. Lynn was the owner of certain lands, situated in King county; that he suffered the taxes thereon to become delinquent, and that a certificate of delinquency therefor was issued by the treasurer of King county to one A. M. Hanley; that Hanley began foreclosure proceedings on his certificate, and caused summons thereon to be duly issued, but failed to serve the same in the manner prescribed by law; that, nevertheless, the court assumed to enter judgment in such proceedings and to order the land sold therein; that the land was so sold, and that one Anthony Harn became purchaser at such sale; that Harn was at the time a married man, and that his wife subsequently died, leaving as her heirs at law certain minor children. It is then alleged that the Oregon and Washington Railroad Company began proceedings to condemn a portion of the land for railroad purposes; that in this proceeding the railroad company made parties defendant the original owner of the property, as well as Harn, the purchaser at the tax sale, and the minor heirs of the deceased wife of Harn; that the Harns alone appeared in the proceedings, the other defendants making default; that the court, on the preliminary hearing, found that the lands were necessary for the use of the railway company, that it was entitled to condemn the same, and it set the cause for hearing before a jury to determine the compensation that should be paid for taking the land; that on the hearing the jury returned the following verdict:

"We, the jury in the above entitled cause, do find for the respondents, Anthony Harn, Earl R. Harn, A. C. Harn, Chas. E. Harn, Mary E. Harn, minor heirs, as compensa-

tion for lots 31, in block three (3), Union Depot Addition, the sum of \$1,350, exclusive of buildings and improvements, and that as damages to lots damaged, but not taken, to wit, lots 1, 2 and 3 of block three (3), in said addition, in the sum of \$65, and that said respondents are the sole owners of said lots.

"We further find, that the respondents John P. Lynn and Jane Doe Lynn, his wife, and Harry White, Will R. White and George W. H. White, have no interest and neither of them has any interest in or to any of the above described real property."

That following this verdict, the following judgment was entered:

"This cause having come on for trial on this 12th day of June, 1907, pursuant to order of the court entered April 26, 1907, and the petitioner appearing by its attorneys, Bogle, Hardin & Spooner, and the respondents, John P. Lynn and Jane Doe Lynn, his wife, and Harry White, W. R. White and W. H. White not appearing, although duly served with notice as prescribed by law, and the respondents, Anthony Harn and Jane Doe Harn, his wife, appearing by their attorney Vince Faben, and Earl R. Harn, Anthony G. Harn, Charles E. Harn, Mary E. Harn and Joseph P. Harn, appearing by their guardian *ad litem*, Anthony Harn, by his attorney, Vince Faben, and demanding a jury trial, thereupon the court ordered that the damages be tried and the value of the property in controversy be assessed by a jury, and thereupon a jury being empaneled, the parties hereto, by their respective attorneys, introduced evidence before the jury as to the value of the property in controversy and the damages to result to the respondents by the taking and appropriating same, and the jury having heard all the evidence, returned a verdict for the respondents, Anthony Harn and Jane Doe Harn, his wife, Earl R. Harn, Anthony G. Harn, Charles E. Harn, Mary E. Harn, and Joseph P. Harn, that the value of the property described in the petition, to wit, lot 31, block 3, Union Depot Addition to South Seattle, according to the plat thereof on file in the office of the auditor of King county, is \$1,350, which is full compensation for the taking of said premises, and that the damages suffered by said respondents to the remaining property belonging to

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them, namely, lots 1, 2 and 3 in said block and addition, is the sum of \$65; and the court further found that Anthony Harn and Jane Doe Harn, his wife, Earl R. Harn, a minor, Anthony G. Harn, a minor, Charles E. Harn, a minor, Mary E. Harn, a minor, Joseph P. Harn, a minor, are the sole owners and parties in interest in the real estate described in the petition herein, and that neither John P. Lynn and Jane Doe Lynn, his wife, Harry White, Will R. White and George W. H. White, nor any other persons or parties whatsoever have any right, title, estate, lien or interest in said real estate, and they and each of them are and shall be forever estopped from claiming such right, title or interest.

"It is therefore ordered and adjudged by the court that the full compensation for the taking of said premises and for all the damages to the said respondents herein is the sum of one thousand four hundred and fifteen dollars (\$1,415), and that upon payment of said sum of money by said petitioner to the clerk of this court for said respondents, Anthony Harn and Jane Doe Harn, his wife, Earl R. Harn, Anthony G. Harn, Charles E. Harn, Mary E. Harn, and Joseph P. Harn, the title to said above described premises, shall be divested out of said respondents and all other persons, and the same and all interest therein shall be vested in the Oregon & Washington Railroad Company, and said Oregon and Washington shall, immediately upon the payment of said sum of money be entitled to enter upon said premises and have the exclusive possession thereof."

That thereupon the railroad company paid the money into court, whereupon it was paid out by the clerk to Anthony Harn for the use of himself and the minor children of his deceased wife. It is further alleged that, during all of the time these proceedings were being had, the fee of the land was in John P. Lynn and that Lynn subsequently conveyed the fee to the plaintiffs in the present action. It is also alleged that the plaintiff tendered to the respective parties paying the same the taxes assessed against the land not paid by John P. Lynn, and that such tender was refused. The prayer of the complaint is that a decree be entered declaring the tax deed from the county treasurer to Harn, and that portion of the decree in the condemnation proceedings as-

suming to adjudicate the title to the land, to be null and void and clouds upon the title of the plaintiffs to such land; that the Oregon and Washington Railroad Company be decreed to pay to the plaintiffs the sum awarded by the jury as compensation for the land taken by them, or, in case of default therein by the company, that the plaintiffs be decreed entitled to the immediate possession of the land. General relief, such as the court shall deem meet and equitable, is also asked.

In this court the appellants contend that they are entitled to relief somewhat broader than the specific relief prayed for in their complaint. They contend, first, that the decree and sale in the tax foreclosure proceedings were void, because the summons thereon was not served in the manner prescribed by the statute, nor in such manner as to give the court jurisdiction to enter the decree and order of sale; and hence, the respondents Harn acquired no title or interest in the land by reason of the purchase at such tax sale; and, second, that the decree entered in the condemnation proceeding is void, because it went beyond the purview of the statute since it assumed to adjudicate not only the compensation that should be paid for the land taken and damaged but the title to the land taken and damaged and what persons were entitled to the award made therefor; and hence, that they are entitled to a decree awarding them possession of the land and declaring the tax and condemnation decrees null and void as clouds upon their title.

With the contention that the tax sale is void we can agree. In tax foreclosure proceedings, service of the summons in some statutory form is necessary in order to give the court jurisdiction to enter a valid judgment authorizing a sale of the taxed property, and in the complaint it is alleged there was no such service. But the contention with reference to the condemnation proceedings is not so well founded. The proceedings are set out in full in the complaint, and show that the petitioning company made parties to the proceed-

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ings all persons shown by the record to have an interest in the property, the original owner of the property as well as the successors in interest of the purchaser at the tax sale, and caused them to be served with process in the manner prescribed by statute. This was sufficient to give the court jurisdiction to enter a final decree of appropriation of the land. It may be that the verdict of the jury and the decree of appropriation as returned and entered—since the verdict found that certain parties owned the land and the decree directed the railway company to pay into court the amount of the award for such owners—went beyond the purview of the statute; but, if this be so, it does not necessarily follow that the decree of condemnation is void, nor that the railway company is now responsible to the true owners for the award by the jury. The record shows that the court treated the defendants Harn as adversary parties to the railroad company's suit, and heard their contentions as to the amount of the award that should be made for the land appropriated, as well as their contentions as to the ownership of the land appropriated and their right to any award that should be made therefor. The railroad company cannot, therefore, be charged with the errors the court and jury may have made in determining who were the owners of the land and entitled to the award made. It could not control that part of the proceedings, and cannot be charged with the consequences thereof. It did its full duty when it made all persons shown to be interested in the property parties to the proceedings, gave them the statutory notice of such proceedings, and paid the award into court for the use of such owners. There was no obligation on its part to hunt out the true owner and pay the award to him personally, as the constitution itself makes it a sufficient payment on the part of a condemner to pay the award into court for the use of the owner, and the statute expressly provides that it may be so paid. Const., art. 1, § 16; Rem. & Bal. Code, § 929. In so far as the

railroad company is concerned, therefore, the complaint fails to state facts sufficient to constitute a cause of action.

It seems clear, also, that the appellants have no cause of action against the Harns for the money paid into court by the railroad company. At the time of the entry of the decree of condemnation, this money became the property of the owner of the condemned land. The condemnation proceedings effected an involuntary sale of the property from the owner to the railroad company. On the entering of the decree, the owner's right to the property ceased and his right to the money became absolute. Any subsequent deed to the condemned land by such owner would therefore convey nothing, for the reason that the owner had no interest in the land to sell. It would not operate as an assignment of the owner's right to withdraw the money from the court for the reason that it contained no apt words of assignment; that is to say, no one can gather from the mere reading of a deed to real property that it was intended by the parties as an assignment of a right to withdraw a sum of money deposited in court for the benefit of the person executing the deed. *In re Seattle*, 26 Wash. 602, 67 Pac. 250. Since, therefore, the appellants have only a deed from the former owner of the condemned land, made subsequent to the condemnation, he has no cause of action for the money paid into court for the land even though it may have been wrongfully withdrawn therefrom by a stranger. This right is a personal right still vested in the person owning the land at the time of its condemnation.

The complaint inferentially shows that the appellants' deed included land purported to have been sold for taxes, not condemned by the railroad company, but as there is no proper description of this land in the complaint, the complaint is insufficient as to it also.

The judgment is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

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[No. 9889. Department Two. January 4, 1912.]

M. O. CARTON *et al.*, Appellants, v. THE CITY OF SEATTLE
et al., Respondents.¹

EMINENT DOMAIN—AWARD—WRONGFUL DISTRIBUTION—LIABILITY. Where, through error and the wrongful action of attorneys, an award in condemnation is adjudged to be paid to persons having no interest therein, and the payment was made and the judgment satisfied, the city as relator is not liable to the true owners of the property; since under Rem. & Bal. Code, § 7784, the payment of the award immediately vests the title in the city, and under Id., § 7778, the duty of making proper distribution is upon the court and not the city.

Appeal from a judgment of the superior court for King county, S. H. Steele, Esq., judge *pro tempore*, entered June 27, 1911, upon granting a nonsuit, dismissing an action to obtain an award in condemnation proceedings. Affirmed.

Carkeek, McDonald & Kapp, for appellants.

Scott Calhoun and *William B. Allison*, for respondents.

CHADWICK, J.—In the prosecution of the Westlake improvement project, the city of Seattle condemned certain property belonging to A. E. Rutherford and wife. So far as it appears from the record, all parties having an interest in the property were brought in and the case proceeded to trial, resulting in a verdict in the sum of \$6,106.20. H. R. Clise and Edwin D. Neupert had each an interest in the property as mortgagees, but made no appearance, nor did they participate in the trial. At the time or before the verdict was rendered, the names of Clise and Neupert were, upon motion of the attorney who appeared for Rutherford, stricken from the verdict. Thereafter, and in due course of the proceeding, the attorney for Rutherford and another, who, so far as this record shows, had no interest in the proceeding, obtained an order from the court directing that the award

¹Reported in 120 Pac. 111.

be paid over to a Mrs. Campbell, who was named in the verdict as an interested party. This was done, and the judgment satisfied. Mrs. Campbell had no interest in the property. Thereafter this plaintiff, M. O. Carton, who was a heavy creditor of the Rutherfords, took a deed for the property, with a contract in which it was agreed that, if the amount of his debt was not paid within six months, the deed should become absolute. There was no redemption, and plaintiff, to secure the entire interest in the property, bought the Clise mortgage outright, taking an assignment therefor, and thereafter bought the Neupert mortgage. There is some contention over the manner and effect of the transfer of the latter mortgage, but for our purposes we shall assume plaintiff's contention that it was regularly assigned and not satisfied. Having the entire title, plaintiff made demand on the city for the amount of the award, and was then informed of the state of the record. Accordingly this action was brought by plaintiffs against the city, the contractors in charge of the work, the present holders of the warrant, and the offending attorneys. From a judgment of nonsuit, plaintiffs have appealed.

This action is waged upon the theory that the city is liable to the plaintiffs for the misapplication of the fund, and the judgment of the trial judge was based principally, if not entirely, upon the theory that the mortgages had become merged in the legal title, and that no recovery could be had by the assignee thereof. We cannot agree with this theory, nor will we discuss it, for we find ample warrant in other principles of the law to sustain the judgment of the trial court. It is a maxim of the law that for every wrong there is a remedy; or, stating the principle the other way, there can be no remedy unless there be a wrong. A wrong consists in a trespass upon the right of another, or in the omission of a duty imposed by law. Applying this test, we cannot conceive how a right of action can be maintained against the city. There is no suggestion that it did not proceed in

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strict accord with the statute. It brought the property within the jurisdiction of the court; it made all interested therein parties, and upon the return of a verdict assessing damages, paid the fund into court, or, what is the same thing, made it available to those who had a lawful claim thereto. Beyond this, it was not required to go. The law puts no duty of segregation, or application of the funds once paid into the registry of the court, upon it, and if the court inadvertently, or as the result of fraud practiced upon it, omits the names of some of the proper parties from the verdict, or makes payment to the wrong party, it does not make the city liable beyond the terms of the statute, or deprive the parties claimant of any rights or obligations *inter sese*.

Practically the same question was before the court in the case of *Silverstone v. Harn*, *ante* p. 440, 120 Pac. 109. It is there said:

"The railroad company cannot, therefore, be charged with the errors the court and jury may have made in determining who were the owners of the land and entitled to the award made. It could not control that part of the proceedings, and cannot be charged with the consequences thereof. It did its full duty when it made all persons shown to be interested in the property parties to the proceedings, gave them the statutory notice of such proceedings, and paid the award into court for the use of such owners. There was no obligation on its part to hunt out the true owner and pay the award to him personally, as the constitution itself makes it a sufficient payment on the part of a condemner to pay the award into court for the use of the owner, and the statute expressly provides that it may be so paid. Const., art. 1, § 16; Rem. & Bal. Code, § 929. In so far as the railroad company is concerned, therefore, the complaint fails to state facts sufficient to constitute a cause of action."

Reference to the statute, Rem. & Bal. Code, § 7784, will show that, upon the making of the award, the city has an immediate vested right in the property, and can take posses-

sion thereof. Its duty to the parties is ended. The duty of distributing the fund is upon the court. Rem. & Bal. Code, § 7778. This section seems to imply that there shall be an interchange of pleadings between the parties interested, and that the court shall make such award as will satisfy the several interests. In the settlement of conflicting demands upon the fund the city can have no possible interest. A right to take the land is a proceeding *in rem*, and is satisfied when the money is substituted for the *res*. Such is the logic of the case of the *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853, where, although the mortgagee was not made a party, the court held, quoting from the case of *Bright v. Platt*, 32 N. J. Eq. 362, that there was a duty upon the parties in interest to see that the fund was properly apportioned. We adopt the following language from the case cited:

“It is the plain duty of the mortgagees to see that the fund is not paid out to the appellants without an assertion of their own claims upon it; and it is the plain duty of the court to dispose of the fund in the same manner as it would have disposed of the land for which the fund is substituted.”

The case of *Thompson v. Chicago, S. F. & C. R. Co.*, 110 Mo. 147, 19 S. W. 77, is very similar to the case at bar. There the mortgagee, as well as certain trustees holding under a deed of trust, was made a party to the suit, but the award of damages was made to the owner of the equity of redemption, without referring to the other interests. The mortgagee brought action against the condemning company. The court said:

“This seems to be an appropriate, if not the proper, course to pursue where an incumbrancer is made a party to a condemnation proceeding. 1 Jones on Mortgages (4th ed.), § 681a; *Goodrich v. Board*, 45 Alb. Law Jour. (Kan.), Nov. 1891, p. 47. The damages awarded to the owner stand instead of the land, and can be subjected to the payment of the incumbrance. *Railroad v. Brown*, 12 L. R. A. 84, and notes. The burden of proof is on the mortgagee to show

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to what extent he has a claim upon the funds; and that question is then litigated between the parties in interest, and not at the cost of the taker of the land.' 1 Jones on Mortgages (4th ed.), § 681a. "The landowner is entitled to full damages, and the question as to the distribution of the money between the mortgagees is a question which does not concern the plaintiff.' *Railroad v. Baker*, 102 Mo. 553."

See, also, *Ross v. Elizabethtown etc. R. Co.*, 20 N. J. L. 230. The right of a mortgagee to maintain an original action for the amount of the award, if maintained, must be based upon the theory that the *res*, or the fund in lieu thereof, has been destroyed. The action is personal and in tort, and the right to maintain it does not pass by deed. *Silverstone v. Harn*, *supra*; 10 Am. & Eng. Ency. Law (2d ed.), 1189.

The judgment of the lower court is therefore affirmed, without prejudice, however, to the plaintiff to invoke the general equity powers of the court in the original action as was done in the *Hess* case, or to take an assignment of the right which is in Rutherford and wife to bring a personal action for damages against those responsible for the present state of affairs. We make no finding as to the rights of the warrant holders, except to affirm the present judgment as to them. The city being entitled to take possession of the property upon payment of the award, it follows that no cause of action is stated against Holt & Jeffery, its contractors.

Affirmed.

DUNBAR, C. J., MORRIS, CROW, and ELLIS, JJ., concur.

[No. 9782. Department One. January 4, 1912.]

JACOB ERNST *et al.*, *Respondents*, v. JAKOB SCHMIDT *et al.*,
Appellants.¹

IMPROVEMENTS—LIABILITY—BREACH OF CONTRACT. Upon breach of an oral contract to convey lands to another placed in his possession, the owner of the lands is liable for the value of improvements placed thereon, over and above the value of the rents and profits while occupied.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered April 4, 1911, upon findings in favor of the plaintiffs, in an action to recover the value of improvements placed upon defendants' land, after a trial before the court without a jury. Affirmed.

Lovell & Davis, for appellants.

John Truax, for respondents.

MOUNT, J.—The plaintiff Jacob Ernst is the son-in-law of the defendants, and Hattie Ernst is their daughter. In December, 1908, the defendants owned a section of land in Grant county. This land was at that time encumbered by a mortgage of \$4,000. They desired to give the land to their children, eighty acres to each of the daughters. With that object in view, they agreed with the plaintiffs that, if plaintiffs would occupy and improve a certain eighty-acre tract for a period of four years, at the expiration of that time the defendants would deed the land to the plaintiffs free from the mortgage. The plaintiffs accepted this offer and moved upon the land, which was unimproved, and proceeded to improve the same by erecting a dwelling house, barn, outhouses, fences, etc., and cultivated a portion of the land. In October, 1909, the plaintiff Jacob Ernst and his father-in-law, Jakob Schmidt, had some words which led to

¹Reported in 119 Pac. 828.

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blows, and the latter ordered the plaintiffs to leave the premises, which about one month later they did. The plaintiffs thereupon brought this action, to recover from the defendants the value of the improvements which they had placed upon the land. Upon a trial of the case, the lower court found in favor of the plaintiffs, and entered a judgment against the defendants for \$960, being the value of the improvements upon the land. The defendants have appealed from that judgment.

Defendants argue that there was no breach of the contract on their part, but that the plaintiffs themselves violated the agreement by leaving the premises, and are therefore not entitled to recover. It is conceded that the defendant Jakob Schmidt, at the time of the trouble, ordered the plaintiffs to leave the property; but it is claimed that the defendants a few days later sent word to the plaintiffs that they need not leave, but should remain upon the land, and there is evidence in the record to support this claim. The plaintiffs denied that they were so informed. The court, after hearing all the evidence upon this point, found that the defendants at the time of the trouble "and several times immediately thereafter, ordered and directed plaintiffs to leave the said lands and premises and to vacate the same; that pursuant to said orders and directions, and for the reason that it was impossible for plaintiffs and defendants to live longer in peace and harmony upon said premises, plaintiffs removed therefrom." We must assume, therefore, that the defendants breached the contract.

The rule is stated in *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403, as follows:

"As to the right of Martin to recover compensation for the value of the improvements which he put upon the land, over and above the rents and profits while he occupied it, it would seem to be founded on the clearest principles of equity. Atkinson got the benefit of these improvements—what justice would there be in not making him pay for them?"

And in *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, 6 Am. St. 489, as follows:

"Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson*, 1 Dev. & B. Eq. 381, in which there was a divided court, but Ruffin, C. J., and Gaston, concurring, and *Albea v. Griffin*, 2 D. & B. Eq. 9, by a unanimous court, to *Hedgepeth v. Rose*, 95 N. C. 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act."

See, also, notes to the same case in 6 Am. St. *supra*.

Whether the original contract in this case was within the statute of frauds or not is immaterial, because where the defendant is found to have breached the contract, he would be liable in either event. The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

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Opinion Per MOUNT, J. •

[No. 9857. Department One. January 4, 1912.]

W. E. ALLEN, *Appellant*, v. H. H. GRANGER *et al.*,
Respondents.¹

CONTRACTS—FOR DIVISION OF PROFITS—CONSTRUCTION BY PARTIES. Where plaintiff subscribed for stock in an irrigation company under an agreement that the money paid was to be used to purchase certain land to be developed, the plaintiff to be paid one-half of the net profits derived from the company "only from the development of the one project," and before development the land was by mutual consent sold at a profit and other land purchased and later also sold at a profit without development, the plaintiff is entitled to his profits only upon the first sale, especially where he at first demanded a share of profits only on that sale and the parties seemed to have construed the contract as confined to that tract of land.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered May 24, 1911, upon findings in favor of the defendants, in an action on contract, after a trial before the court without a jury. Affirmed.

A. H. Kenyon, for appellant.

Merritt, Oswald & Merritt, for respondents.

MOUNT, J.—This action was brought by the plaintiff to recover one-half of the profits derived from the purchase and sale of two tracts of land by the defendants. The defendants conceded that plaintiff was entitled to one-half of the net profits of the purchase and sale of the first tract of land, but denied that he was entitled to such profits on the second tract. The case was tried to the court without a jury, and findings and a judgment were entered in favor of the defendants. The plaintiff has appealed.

It appears that all of the parties to the action were stockholders in a corporation known as the Granger Under Current Water Motor Company. The defendants solicited the plaintiff to purchase stock in that company, which he did

¹Reported in 119 Pac. 817.

on October 15, 1909, under the terms of a written contract which, omitting the immaterial portions, is as follows:

"That for and in consideration of the purchase of five thousand shares of treasury stock of said Granger Under Current Water Motor Company by said W. E. Allen, and the payment to said company of five thousand dollars (\$5,000) for such stock, the said first parties agree to pay to said W. E. Allen as hereinafter specified, a sum of money equal to one-half of all the net profits derived by said company from the use of said amount of five thousand dollars (\$5,000) in the purchase of lands and the development of the same through the construction and installation of one Granger Under Current Water Motor, such lands to be developed as an irrigation project. And it is further agreed between the parties hereto that said Granger Under Current Water Motor Company shall use said five thousand dollars (\$5,000) paid to said company by said W. E. Allen for the purpose of the purchase of land suitable for irrigation by one Granger Under Current Water Motor. The construction and installation of such motor, the perfection of such lands for sale and the necessary expenses of such purchase, development, perfection and sale, and that such lands shall be so improved and sold by said company within such reasonable time as said company can procure lands, construct and install such motor, prepare the land for sale and dispose of the same. Further it is agreed between the parties hereto that the said payment by said H. H. Granger, F. V. Granger and R. M. Dye, of an amount equal to one-half of all the net profits derived by said Granger Under Current Water Motor Company through the use of the said five thousand dollars (\$5,000) for the purchase of lands and development and sale of the same, as one project, as above specified shall be made immediately upon the receipt of the selling price of such lands by said company. Provided, that said W. E. Allen shall be entitled to such extraordinary apportionment of the net profits derived by said company, only from the development of the one project hereinbefore described, and provided that there shall be deducted the amount of the net profits of such company to which the five hundred shares of treasury stock already sold by said company are regularly entitled before the payment of profits to said W. E. Allen."

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The plaintiff thereupon gave his note for \$5,000, due in eight months, to the company in payment of the stock. He was thereupon elected an officer of the company. At the time the note was given, it was the intention of the company to purchase and irrigate a tract of land and sell it out in parcels prior to the time the note matured. A short time after the contract was entered into, the company used the note in the purchase of the tract of land known in the record as the Clark tract, for an agreed price of \$2,500. Thereafter some preliminary steps were taken towards irrigating the land, but before any of these improvements had been made, the company, by consent of all of the parties, sold the tract for \$7,500, and thereby made a net profit of \$4,752.35. The plaintiff's note was not then due and was not paid. Shortly after this sale, the company purchased another tract of land, known in the record as the Anderson tract, and paid therefor something over \$11,000. At the time of this transaction, the plaintiff took up his note to the company, and in lieu thereof executed a new note for the same amount, which was indorsed by the company and delivered to Mr. Anderson in part payment of the land last purchased. The company held this land for a short time, but, before anything was done toward irrigating it, sold the same for \$20,000, making a net profit of about \$8,824. The plaintiff thereupon demanded payment of his profit upon the "first project," and \$1,964.80 was paid to him. He afterwards demanded one-half of the profits of both sales. This was refused, and he brought this action, claiming that he was entitled to one-half of the profits upon both sales, for the reason that the first venture was not carried out and that the second was merely a substitution for the first. After the action was brought, the defendants tendered to the plaintiff the balance of the profits admitted to be due upon the sale of the first property purchased.

The controlling question in this case is the proper meaning of the contract. The contract provides that the money

paid by the plaintiff shall be used for the purchase, development, and sale of land; that the defendants shall pay one-half of the net profits derived from the sale of such lands as "one project." Payment shall be made immediately upon the receipt of the selling price; "Provided the said W. E. Allen shall be entitled to . . . the net profits derived by said company, only from the development of the one project;" that is, the sale of lands first purchased by the company. The defendants conceded this; and the trial court so construed the contract, and entered a judgment in his favor for the amount of the tender, with costs against the plaintiff. We think the trial court was clearly right. It is true that the contract also provides for the use of the money "in the purchase of lands and the development of the same through the construction and installation of one Granger Under Current Water Motor; such lands to be developed as an irrigation project." But it is conceded that neither of these tracts was so developed or developed at all. They were both sold at large profits by consent of all the parties, before any development was done thereon. The parties treated each tract as developed, and sold the same without the development contemplated by the contract. Before the plaintiff began his action, he wrote a letter to Mr. Granger demanding \$1,700, and in that letter said:

"Now, this is asking considerable, but it is the only way out of it, for if he starts action in order to protect himself, I will have to start action to collect one-half the net profits on the first deal according to our written agreement;"

thus showing that, up to that time the plaintiff treated the first purchase and sale as the "first deal" or the "first project," under the contract upon which he was entitled to one-half of the net profits. If the plaintiff's construction of the contract is to be adopted, to the effect that the first purchase and sale was not the "one project" because the land was not developed as an irrigation project but was nevertheless sold, still he cannot recover in this action because neither of the

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projects was so developed. The company simply purchased one tract of land and sold it at a profit. It then purchased another tract and sold that also at a profit. Neither tract was developed as an irrigation project. Plaintiff is now insisting, however, that he is entitled to his profits on both of these tracts, because he elects to treat them as one developed project. In short, the plaintiff is not consistent in his position. He must either treat the first sale as a completed project, or admit that the company has not yet purchased and developed and sold the tract upon which his profits may be based. We think both parties have treated the first purchase and sale as a completed project, and that plaintiff's profits are based upon that transaction.

The judgment is therefore affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

[No. 9821. Department Two. January 4, 1912.]

W. D. HALE *et al.*, *Respondents*, v. CITY CAB, CARRIAGE & TRANSFER COMPANY, *Appellant*.¹

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS. Upon appeal from an order granting a new trial, affidavits not brought up by statement of facts cannot be considered, and it is not sufficient to have them attached as exhibits without identification by the judge's certificate.

PARTNERSHIP—FIRM NAME—FILING DESIGNATION. Under Rem. & Bal. Code, § 8372, exempting partnerships in which the firm name contains all the names of the partners from the necessity of filing with the county clerk the designation of the firm with the true names of all the partners, plaintiffs, doing business under the name of "Hale-Tindall Co.," which contains the names of all the partners, are exempt from the requirements of the statute.

PARTNERSHIP—FILING DESIGNATION—ACTIONS—CAPACITY TO SUE—WAIVER. The objection that a partnership, doing business under an assumed name, cannot maintain an action because it had failed to file with the county clerk the designation of the firm with the names

¹Reported in 119 Pac. 837.

of all the partners, as required by Rem. & Bal. Code, § 8369, goes only to the capacity to sue, and is waived if not raised by demurrer or answer.

APPEAL—RECORD—ORDER. The supreme court will not consider an appeal from an order where the record on appeal does not disclose the order or any action of the court in that regard.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered January 21, 1911, granting a new trial, after a verdict in favor of the defendant, in an action for damages to an automobile through a collision with a runaway team. Affirmed.

John M. Gleeson and Joseph F. Morton, for appellant.

ELLIS, J.—Appeal from an order granting a new trial. The jury returned a verdict in favor of defendant, appellant here, and on motion of plaintiffs, respondents here, a new trial was granted. The motion assigned all of the statutory grounds excepting the sixth (Rem. & Bal. Code, § 999), and stated that it was based upon "the records and files herein and upon the affidavits hereinafter to be filed herein." No affidavits were attached to or made a part of the motion as appears from the transcript. The order for new trial was entered January 21, 1911. It is couched in general terms.

The appellant contends that the order was granted solely on the grounds of surprise and newly discovered evidence. There is nothing in the order to substantiate this claim. It states no grounds. Appellant quotes at length from an affidavit purporting to show surprise and new evidence which it is claimed was made in support of the motion. No such affidavit, however, appears anywhere in the record. Reference is also made to other affidavits which it is claimed were used on the hearing of the motion for new trial. They are not embodied in the statement of facts and there is no certificate of the trial judge that they were so used. None of these affidavits nor any affidavits are embodied in, attached to, or in any manner made a part of the statement of facts,

nor covered by the judge's certificate thereto. For this reason, under repeated decisions of this court, we cannot consider them. *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839; *State v. Yandell*, 34 Wash. 409, 75 Pac. 988; *Griggs v. MacLean*, 33 Wash. 244, 74 Pac. 360; *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487; *Shuey v. Holmes*, 27 Wash. 489, 67 Pac. 1096.

The notice of filing of the proposed statement of facts seems to indicate that counsel for appellant held the mistaken view that it was only necessary to have these affidavits included in the files in the same manner as exhibits. The notice states that the clerk will be requested to attach to the statement the exhibits; "and in addition thereto, defendant's motion for a new trial, together with affidavits now on file in said court and cause which were used on the hearing of said motion for a new trial together with the order overruling the same." This would not be sufficient. Affidavits used on a motion for new trial must be made a part of the statement and identified by the judge's certificate as those so used on the hearing before we can consider them.

Counsel also raises, somewhat vaguely, a contention that the court should have refused to grant a new trial because the complaint and evidence show that the plaintiffs were partners doing business under an assumed name, designation or style, and have failed to file in the office of the county clerk a certificate setting forth the designation or style of the firm and the true names of all of the partners, as required by chapter 145, page 288, Laws of 1907 (Rem. & Bal. Code, § 8369 *et seq*). This objection was not taken by demurrer or answer. The point was barely suggested by an objection to evidence as to who was the managing partner, which on reference to the statute the court overruled on the ground that the partnership designation, Hale-Tindall Company, contains the names of all the partners, thus falling within the proviso of section 4 of the act (Rem. & Bal. Code, § 8372).

The ruling was correct. *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192.

Moreover, we have consistently held, in construing this statute and the cognate statute as to corporations, that they go only to the capacity of the party to sue and that the objection must be deemed waived unless raised by demurrer or answer. *Bowman v. Harrison*, *supra*; *Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *Thompson-Spencer Co. v. Thompson*, 61 Wash. 547, 112 Pac. 655.

The notice of appeal specifies that the appeal is from the order granting a new trial entered January 21, 1911, and also from an order entered January 30, 1911, refusing to dismiss the action for plaintiffs' failure to allege and prove the filing of a partnership statement. This latter order does not appear in the transcript nor does there appear any motion or other proceeding invoking the court's action in that regard. We cannot entertain an appeal from an order not brought before us. In any event, it is manifest that, if such an order was made, it was correct, since it is apparent that the point was raised after it had been waived by failure to raise it by demurrer or answer and after the order granting a new trial had been made.

No ground for disturbing the order granting a new trial which we can consider being suggested, the order is affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

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Opinion Per PARKER, J.

[No. 9597. Department One. January 4, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.HANNAH BEEBE, *Appellant*.¹

CRIMINAL LAW—EVIDENCE—DECLARATIONS OF CODEFENDANT. Upon a separate trial of one charged as an accessory to a homicide, confined to acts committed at the time and place of the killing, it is error to admit evidence of threats against the deceased and of declarations in the nature of confessions, made by the principal or codefendant both before and after the homicide at times when the accessory was not present.

HOMICIDE—MANSLAUGHTER—DEFINITION—EVIDENCE—QUESTION FOR JURY. Under Rem. & Bal. Code, § 2395, defining manslaughter in broad terms as including all homicides other than those specified in Id., §§ 2392, 2393 and 2394, the court cannot determine the degree and decide, as a matter of law, that the defendant was necessarily guilty of one of the higher degrees, where it appears that defendant was having a dispute with the deceased over a fence, called his attention to the gun carried by defendant's daughter who evidently heard the remark and who had made threats against the deceased; since defendant's guilt did not depend entirely on the presence or absence of design on her part, the same being a question for the jury.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 16, 1910, upon a trial and conviction of manslaughter. Reversed.

Martin Rozema, for appellant.

Fred Kemp and *Ludington & Kemp*, for respondent.

PARKER, J.—Della Totten and Hannah Beebe were jointly charged with the crime of murder in the first degree, by information filed in the superior court for Chelan county, as follows:

"That the said Della Totten, in the county of Chelan, state of Washington, on the tenth day of August A. D. 1910, then and there being, then and there wilfully, unlawfully and feloniously of her deliberate and premeditated malice, and

¹Reported in 120 Pac. 122.

with a premeditated design to effect the death of one James E. Sutton, killed said James E. Sutton, by then and there wilfully, feloniously and of her deliberate and premeditated malice and with premeditated design to effect his death, shooting and mortally wounding the said James E. Sutton with a shot-gun which she, the said Della Totten, then and there held in her hands; and that said Hannah Beebe then and there, at the said felonious shooting and killing of said James E. Sutton by said Della Totten as aforesaid, wilfully, unlawfully, feloniously and of her deliberate and premeditated malice and with a premeditated design to effect the death of said James E. Sutton, was present, and that she, the said Hannah Beebe, did then and there feloniously, wilfully and of her deliberate and premeditated malice and with premeditated design to effect his death, counsel, aid, incite, abet and encourage the said Della Totten in the said felonious shooting and killing of said James E. Sutton, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington."

Hannah Beebe was awarded a separate trial, which resulted in her conviction of manslaughter, upon which she was sentenced for a term of not less than one nor more than two years in the penitentiary. From this conviction, she has appealed.

Appellant is a widow, about 69 years old, and Della Totten is her married daughter. On August 10, 1909, and for some years prior thereto, they lived within a few rods of each other, each upon their own land, some five miles southwest of the town of Cashmere, Chelan county, in what is commonly known as Bender canyon. James H. Sutton, and his family consisting of several boys and girls, one of whom was James E. Sutton, the deceased whose death is charged to appellant and her daughter, lived upon their ranch at the head of the canyon above and adjoining the land of appellant. For some years prior to August 10, 1910, the Sutton family had been accustomed to use a private road running across appellant's land, which constituted their most con-

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venient way out to the town of Cashmere. This road also furnished a convenient way to other land belonging to the Sutton family, situated in the canyon below the land of appellant. Photographs of this road offered in evidence indicate that it is a well traveled road and has been used a great deal.

There does not appear to have been any effort on the part of appellant to close this road to the Suttons, until shortly prior to August 10, 1910. On August 9, 1910, appellant built a wire fence across the road within the boundaries of her own land, and placed there a sign containing the words, "No trespassing." This fence and sign were placed in view of the homes of appellant and her daughter, and apparently not exceeding two hundred yards therefrom. During the evening of that day, some one cut the wires and opened the fence so as to permit the usual free passage along the road, and also removed the sign. The following day, August 10th, appellant and her daughter concluded to rebuild a fence across the road and put up another sign. Early in the afternoon of that day, probably about one o'clock, appellant went to the place alone, carrying some tools, and about fifteen minutes later her daughter followed, carrying a shot gun and a new sign which she had prepared. One or the other also carried a lunch, their intention evidently being to remain a considerable time. The daughter, Mrs. Totten, was somewhat skilled in the use of the gun, having used it in shooting game and small predatory animals. Appellant testified that she did not know that her daughter was going to bring the gun along until she arrived with it, and there is no evidence showing otherwise. They then proceeded to rebuild the fence and put up the new sign, completing their work in about an hour and a half. They then stationed themselves a short distance away upon the hillside to the east of the road and fence they had constructed, where they remained until the shooting of the deceased occurred late in the afternoon.

About three o'clock, the elder Sutton drove down the road

from his place with a load of wood, and upon finding the road closed by the wire fence and the two women there apparently on guard, he unhitched his team from the load of wood, leaving it near there, and returned with his team. Some time thereafter, probably an hour and a half or two hours, James E. Sutton, the deceased, his sister and a younger brother drove down the road on the way to their garden, on their land in the canyon below the land of appellant. When they arrived at the fence across the road, the deceased got out of the buggy, took an axe and a hammer out of the back part of the buggy, and proceeded to cut the wires and remove the fence from across the road. Appellant then came down from where she and her daughter were, and called his attention to the sign, to which he replied, indicating that he did not care for the sign, and proceeded with his work of cutting the wires. Appellant then pointed to the hillside where the daughter, Mrs. Totten, stood with the gun, and asked him if he saw the gun, to which he made no answer, but proceeded with his work of cutting the wires. While he was at this work, appellant was hitting at his hands with an axe, evidently trying to interfere with his cutting the wires. While this was going on, Mrs. Totten made some remark about shooting him. Some words also passed between her and the sister who was sitting in the buggy, when Mrs. Totten threatened to shoot the sister if she did not keep still, at the same time pointing the gun at her. About the time the deceased finished cutting the wires. Mrs. Totten called to her mother to get out of the way and she would shoot him. He then looked towards Mrs. Totten who was coming down the hill towards him. He dodged two or three times, evidently trying to get behind a large stump near the roadside, and was then shot by Mrs. Totten in the side of his neck, resulting in his death almost instantly. Mrs. Totten had advanced to within about ten feet of him when she fired the fatal shot. These facts are not seriously disputed. There are no facts shown by the record indicating

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that appellant had anything to do with this fatal occurrence other than what occurred then and there.

It is contended by counsel for appellant that the trial court erred in admitting evidence, over their objections, of threats made by Mrs. Totten against members of the Sutton family some time prior to the killing of the deceased, and also evidence of statements made by Mrs. Totten in the nature of admissions on her part, tending to show her own guilt, after the killing of the deceased. These threats and statements were all made out of the presence of appellant, and we are not able to find in the record any evidence tending to show concerted action on their part looking to the injury of any member of the Sutton family, save their acts occurring at the time of the killing of the deceased which we have above summarized. These threats and statements of Mrs. Totten's seem to have been admitted in evidence by the trial court upon the theory that any evidence tending to show Mrs. Totten's guilt was admissible against appellant whether it tended directly to show her guilt or not. This theory seems to have been rested upon the holding of this court in *State v. Mann*, 39 Wash. 144, 81 Pac. 561.

We think, however, that there was reason for the admission of such evidence in that case which is not present here. In that case, Mann was charged with being accessory before the fact, and all of the proof in support of the charge was in accord therewith. He was neither charged with nor proven to have been present at the burning of the building, the crime being arson. In that case, the charge appears to have been made in conformity with the views of this court expressed in *State v. Gifford*, 19 Wash. 464, 53 Pac. 709, where it was held that, notwithstanding our law has abolished all distinctions between accessories before the fact and principals in crime (Rem. & Bal. Code, § 2007), it is necessary to charge the facts constituting the crime; and hence, necessary to charge a defendant as accessory before the fact if proof of being such accessory only is relied upon for con-

viction. It is pointed out in that decision that the state constitution seems to require such facts to be charged where it is sought to connect the accused with the crime by proof of prior acts, instead of by proof of acts at the time the crime is consummated. No act is here charged against appellant save such as occurred at the time and place of the consummation of the crime. The charge is, that appellant "then and there at said felonious shooting and killing of said James E. Sutton . . . was present, and that she the said Hannah Beebe did then and there, . . . counsel, aid and abet and encourage said Della Totten in said felonious shooting . . ." etc. It is true that, in form, appellant is charged as an aider and abetter. This, however, is in effect, charging her as principal; since it is confined to acts committed by her at the time and place of the killing of the deceased. Under this charge, her guilt is not dependent on the guilt of Mrs. Totten, who, under the old law, would be technically designated as principal in the first degree. Rem. & Bal. Code, §§ 2007, 2260; 2 Am. & Eng. Ency. Law (2d ed.), 80; 1 McClain, Criminal Law, § 216; *Williams v. United States*, 1 Ind. Terr. 560, 45 S. W. 116; *State v. Jarrell*, 141 N. C. 722, 53 S. E. 127.

It logically follows that evidence which bears only upon Mrs. Totten's guilt is irrelevant to appellant's guilt. The right of appellant to a separate trial, as guaranteed by Rem. & Bal. Code, § 2161, is, in substance, the right to have her guilt or innocence determined from proof of acts for which she alone is responsible. Apparently the very purpose of the law in giving her a separate trial, upon demand, is to free her from the possible prejudicial effect of evidence which might be admissible to prove facts tending only to show Mrs. Totten's guilt, which would not be admissible if appellant were being tried alone. If the right of separate trial does not secure this protection, then such right is of but little value. The confession of one codefendant was held inadmissible as against the other, upon a separate trial,

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in *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044. In *State v. Nist*, ante p. 55, 118 Pac. 920, some observations are made in harmony with this view, and the case of *State v. Mann*, *supra*, distinguished from cases of this nature.

The authorities seem to be quite uniform in holding, in cases of this character, that prior threats and statements, as well as subsequent admissions and statements made by one codefendant, are not admissible against the other, upon a separate trial, and that such statements are regarded as hearsay as much as if they had been made by a stranger. Of course it needs no argument to show that such evidence would almost certainly be prejudicial to the defendant on trial. Among authorities supporting this view, we note the following: *Langford v. State*, 130 Ala. 74, 30 South. 503; *State v. May*, 142 Mo. 135, 43 S. W. 637; *Willis v. State*, 67 Ark. 234, 54 S. W. 211; *State v. Hickman*, 75 Mo. 416; *Shelby v. Commonwealth*, 91 Ky. 563, 16 S. W. 461; *State v. English*, 14 Mont. 399, 36 Pac. 815; *Mixon v. State* (Tex. Cr.), 31 S. W. 408; *People v. Kief*, 126 N. Y. 661, 27 N. E. 556; *Martin v. State* (Tex. Cr.), 30 S. W. 222; *Ford v. State*, 112 Ind. 373, 14 N. E. 241. We conclude that the admission of the evidence tending to show statements made by Mrs. Totten, both before and after the killing of the deceased, was error prejudicial to the rights of appellant, such as calls for a new trial in her behalf.

It is contended that the facts developed in this case are such that it can be determined, as a matter of law, that appellant is not guilty of manslaughter, but that she was necessarily guilty of one of the higher degrees of homicide or else free from all guilt, and the jury having, in effect, acquitted her of the higher degrees, she should now be discharged. We cannot agree with this contention, in the light of the facts above summarized. The crime of manslaughter under our law, as at present defined, covers a very wide range of degrees of guilt. Except as applied to certain specific acts with which we are not here concerned, man-

slaughter is defined, not by an affirmative statement of inclusion, but by a statement excluding other homicides, as follows:

"In any case other than those specified in sections 2392, 2393 and 2394, homicide, not being excusable or justifiable, is manslaughter.

"Manslaughter is punishable by imprisonment in the state penitentiary for not more than twenty years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment." Rem. & Bal. Code, § 2395.

It will thus be seen that manslaughter may consist of a very slight or a very great degree of guilt on the part of the accused. This was fully recognized by the learned trial judge in the light sentence imposed upon appellant. In view of the knowledge of appellant that her daughter had the gun; her altercation with the deceased, and her calling his attention to the gun, the daughter evidently hearing this remark by appellant; the threats of the daughter, made very near the same time, and the shooting of the deceased by the daughter very soon thereafter, we think might warrant the jury in believing that appellant was not entirely free from responsibility for the death of the deceased, though they might also believe that she had no design to assist in causing his death. We think it is for the jury to say whether or not any degree of guilt attached to appellant in this regard. The jury were not obliged to believe appellant's guilt or innocence depended entirely upon the presence or absence of design on her part such as would confine their inquiry to the higher degrees. We think reasonable minds might differ on this question, and therefore, we cannot decide it as a matter of law.

Error assigned upon instructions we think are without merit and require no discussion; but, because of the error in the admission of the evidence above discussed, we conclude that appellant must be granted a new trial. The judgment

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is reversed for further proceedings in accordance with the views herein expressed.

DUNBAR, C. J., FULLERTON, MOUNT, and GOSE, JJ., concur.

[No. 9617. Department Two. January 4, 1912.]

THEODORE NELSON, *Appellant*, v. SIBLEY CONTRACTING
COMPANY, *Respondent*.¹

EXPLOSIVES — NEGLIGENT SALE — EVIDENCE — ADMISSIBILITY — SUFFICIENCY. In an action for injuries sustained by one purchasing "Jexite," a white powder containing no picric acid, alleged to be highly explosive and dangerous, a recovery cannot be sustained on the testimony of a chemist as to experiments made by him with a powder called "Jexite," which it appears was a yellow powder containing picric acid and entirely different ingredients from the powder sold, and which had been used only in the experimental stage and was not on the market commercially.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 23, 1911, dismissing an action in tort, upon withdrawing the case from the consideration of the jury. Affirmed.

W. H. Plummer and Henry Jackson Darby, for appellant.
Cannon, Ferris, Swan & Lally, for respondent.

MORRIS, J.—Appellant, claiming to have been injured while in the employ of respondent, through the explosion of a blasting powder known as "Jexite," brought this action, alleging the negligence of respondent in furnishing him with a highly explosive and dangerous powder with which he had no previous experience, without warning him of its highly explosive and dangerous character, and that while using it as directed it suddenly exploded, due solely to its highly explosive and dangerous character. It will not be necessary to refer to the defense as set up in the answer, since no ques-

¹Reported in 119 Pac. 829.

tion arises thereon. At the conclusion of the evidence the court sustained respondent's challenge to its sufficiency, and dismissed the action, and plaintiff appeals.

The main error alleged is the court's action in striking out the testimony of a chemist, who had testified to the explosive and dangerous character of a yellow substance called "Jexite" which had been furnished him by appellant for experimental purposes, and dismissing the action on respondent's challenge. Without this testimony, there was absolutely no evidence of the dangerous character of Jexite, as charged in the complaint. It subsequently appeared that Jexite, as used by respondent in its construction work and furnished to appellant, was a white powder, differing materially from the yellow substance examined by the chemist and concerning which he testified; that the yellow powder was composed of seventy-three per cent of chloride of potash, picric acid, and flour, the percentage of the last two ingredients not being given; that the company manufacturing Jexite had used picric acid in combination with chlorate of potash and flour, producing a yellow substance similar to appellant's exhibit, but that such combination was only used in the experimental stage; that the product had never been put on the market nor manufactured commercially; that the powder used by respondent, and which was used by appellant, was a white powder containing no picric acid, but was composed of potash sixty-six per cent and flour thirty-four per cent. It was also shown that, while the yellow powder would explode by friction, the white powder would not. Appellant made no attempt to rebut this testimony, or to make any showing that the yellow powder was the one used by him at the time he claims to have been injured. The testimony of the chemist was, therefore, immaterial and properly stricken. Respondent's testimony being unchallenged, and there being no attempt to show that the powder used by appellant in preparing the blast that injured him was of the character as charged in the complaint, and upon which he based his right

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of action, there was nothing to submit to the jury, and the challenge was properly sustained, and the motion granted. *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870.

The other assignments of error are without merit, and the judgment is affirmed.

DUNBAR, C. J., CHADWICK, CROW, and ELLIS, JJ., concur.

[No. 9503. Department Two. January 4, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. EDWARD R.
WHITNEY *et al.*, *Respondents*.¹

PUBLIC LANDS—SCHOOL LANDS—FEDERAL GRANT—CONSTRUCTION—GRANT IN PRAESENTI OR FUTURO. The Federal grant to the state of school sections 16 and 36, by 25 Stat. at L. 676, §§ 10 and 11, whereby the land was "hereby granted" to the state, was a grant *in praesenti*, vesting title in the state, although the land was unsurveyed, in view of the provision of § 11 that such land shall not be subject to preemption, homestead, or any other entry, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SAME—SCHOOL LANDS—GRANTS—WITHDRAWAL FROM ENTRY—STATUTES—IMPLIED REPEAL—GENERAL ACT REPEALED BY SPECIAL ACT. The amendment of the general act of 1859, 11 Stat. at L. 385, which provided that school sections 16 and 36 shall be subject to the homestead or preemption claims of settlers where settlements have been or shall hereafter be made before survey of the lands in the field, by the act of 1891, 26 Stat. at L. 796, which added the provision for lieu sections by the states or territories, of other lands of equal acreage when such settlements have been or shall hereafter be made before the survey in the field, did not have the effect of impliedly repealing the special act of 1889, 25 Stat. at L. 676, granting *in praesenti* to the states of North and South Dakota, Montana, and Washington, school sections 16 and 36, and providing that the same shall not be subject to any entry whether surveyed or unsurveyed; as repeals by implication are not favored, and a special act will not be held to be impliedly repealed by a general law on the same subject, unless the intent to repeal is clearly manifest.

PUBLIC LANDS—SCHOOL LANDS—GRANT TO STATE—COMPACT WITH STATES—EFFECT OF SUBSEQUENT ACT. The grant to the states of

¹Reported in 120 Pac. 116.

North and South Dakota, Montana and Washington, of school sections 16 and 36, with the special provision that the same shall not be subject to any entry whether surveyed or unsurveyed, was a compact with the states that could not be affected by a subsequent act amending the general law applicable to such grants in other states, whereby settlements prior to the survey in the field were given precedence and the states compelled to accept lieu selections of the lands.

ESTOPPEL—AGAINST STATE—PLEADING. In an action by the state to recover possession of part of a school section, homesteaded by the defendant, an answer alleging allowance of defendant's homestead application and that he had made improvements on the land with the knowledge and consent of the state, is insufficient to support an estoppel against the state.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 29, 1911, dismissing an action of ejectment, upon overruling a demurrer to an affirmative defense. Reversed.

The Attorney General and R. E. Campbell, Assistant, for appellant.

John Arthur, for respondents, cited, among other authorities: Heydenfeldt v. Daney Gold & Silver Min. Co., 93 U. S. 634; State v. Johanson, 26 Wash. 668, 67 Pac. 401; Terry v. Megerle, 24 Cal. 610; Rooker v. Johnston, 49 Cal. 3; Finney v. Berger, 50 Cal. 248; Medley v. Robertson, 55 Cal. 396; Bullock v. Rouse, 81 Cal. 590, 22 Pac. 919; McNee v. Donahue, 142 U. S. 587; United States v. Montana Lumber & Mfg. Co., 196 U. S. 573; United States v. Bonners Ferry Lumber Co., 184 Fed. 187; Cooper v. Roberts, 18 How. 173; Beecher v. Wetherby, 95 U. S. 517; Minnesota v. Hitchcock, 185 U. S. 373; State of Minnesota v. Bachelder, 1 Wall. 109; State of Washington v. Kuhn, 24 Land Dec. 12; Todd v. State of Washington, 24 Land Dec. 106; Noyes v. State of Montana, 29 Land Dec. 695; Black Hills National Forest, 37 Land Dec. 469; State of Montana, 38 Land Dec. 247; Balderston v. Brady, 17 Idaho 567, 107 Pac. 493; Sherman v. Buick, 93 U. S. 209; Layton v. Farrell,

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11 Nev. 451; *Ivanho Min. Co. v. Keystone Consol. Min. Co.*, 102 U. S. 167; *United States v. Curtner*, 38 Fed. 1; *Missouri, Kan. & Tex. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *Holmes v. United States*, 118 Fed. 995; *Clemmons v. Gillette*, 33 Mont. 321, 83 Pac. 879, 114 Am. St. 814; *Abel v. Hansen*, 62 Wash. 492, 114 Pac. 182; *Gauthier v. Morrison*, 62 Wash. 572, 114 Pac. 501.

MORRIS, J.—The state brought this action to recover possession of, and quiet title to, land in section 36, township 34 north, range 7 east; alleging that it became the owner, under and by virtue of the grant from the United States as contained in the enabling act of February 22, 1889, and that respondents are wrongfully in possession. Respondents answered, alleging a settlement upon the land in 1902; that the title to the land was then in the United States; that, on April 25, 1906, the plat of said land was filed in the local land office; and that respondent Edward R. Whitney on said day filed his homestead application, which was allowed. Respondents further allege the making of improvements upon the land with the knowledge and consent of the state, and claim an estoppel against any assertion of title on the part of the state. A demurrer was interposed to this defense, which was overruled, and thereafter the case was dismissed. The answer and the demurrer properly raising all the questions of law involved in the case, the state has appealed, and we are now called upon to review the questions of law submitted by the demurrer.

The questions to be determined by this appeal involve two main propositions: The nature and extent of the grant to the state, as contained in the enabling act of 1889; and the intent and effect of the act of Congress of February 28, 1891, as restricting or modifying this grant. The state bases its title upon the enabling act of February 22, 1889, as found in 25 Stats. at L. 676. Sections 10 and 11 are as follows:

“Section 10. That upon the admission of each of said

states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the secretary of the interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character, be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

"Section 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulation as the legislature shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

By these two sections, the state contends the Federal government made a present grant of sections 16 and 36 in each township to the state of Washington, upon its admission into the Union; and that, although many of these lands were then unsurveyed, the title passed and vested in the state upon its admission, as of the date of the grant; and all that remained for the Federal government to do thereafter was to extend its surveys over these sections and thus identify

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them. An examination of the different acts under which Congress has granted lands to the different states, beginning with that to Indiana in 1816, will disclose that, in the act of 1889, under which the states of North and South Dakota, Montana and Washington came into the Union, Congress has, for the first time, in prescribing the conditions of the grant, provided in § 11: "and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Prior to the grant to California in 1853, the words used to indicate the grant were "shall be granted." These words have uniformly been held to signify the intention of Congress to make a grant *in futuro*, to become effective when the lands were subject to identification by survey. In the California act, and in that of Nevada and Nebraska, the words used were, "shall be and are hereby granted." In 1875, in the grant to Colorado, Congress for the first time made use of words indicating its purpose, as we view it, to change from a grant *in futuro* to a grant *in praesenti*, by employing the words "are hereby granted." This act was followed by the act in question when, in addition to making a grant *in praesenti* by using the words of the Colorado act, "are hereby granted," the further provision was made, that such land should not be subject to any form of entry under the land laws of the United States.

We cannot conceive how Congress could have employed stronger language to indicate its purpose and intention to divest the United States of all title in these lands, and grant them to the several states for school purposes. We must assume that, in changing its language from words of future grant, as in the earlier acts, to the words employed in this act, it did so advisedly, and sought in the restriction against any form of entry, as found in § 11, to indicate its intent to pass to the states all title and control over these lands,

save the right of entry for the purpose of survey. That the words "hereby granted" indicate a grant *in praesenti*, and pass, not a special or limited interest in the land, but are words of absolute donation and vest a present title, subject only to survey to give precision to the grant and attach it to any particular tract, is, to our minds, established by the Federal cases reviewing such language as applied to grants from the Federal government, as held in *Missouri, Kan. & Tex. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1. In the latter case it is said:

"The language of the statute is 'that there be and hereby is granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future . . . This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. *Schulenberg v. Harriman*, 21 Wall. 44, 60; *Leavenworth, Lawrence &c. Railway Co. v. United States*, 92 U. S. 733; *Missouri, Kansas &c. Railway Co. v. Kansas Pacific Railway Co.*, 97 U. S. 491; *Railroad Co. v. Baldwin*, 103 U. S. 426. The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of *Rice v. Railroad Co.*, 1 Black, 358; but unless qualified they are to receive the interpretation mentioned."

The above language is quoted in the subsequent case of *United States v. Southern Pac. R. Co.*, 146 U. S. 570, where, in construing a grant to the Atlantic & Pacific Railroad Company, made in 1866, and one to the Southern Pacific Railroad Company, in 1871, wherein the same lands were contained, it was held, that, notwithstanding the Atlantic & Pacific did not construct its line, and its rights were forfeited and the lands restored to the public domain by the act of July 6, 1886, the Southern Pacific could not claim title to the lands by virtue of its grant and the construction

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of its road, because the grant could take effect by relation only as of the date in 1871, and at that time and for nearly five years theretofore, the title to these lands had been in the Atlantic & Pacific, and that, even if Congress had in terms expressed an intent to that effect in a subsequent act, it was not competent by such legislation to divest the rights already vested in the Atlantic & Pacific. The same rule is announced in *Railway Co. v. Alling*, 99 U. S. 463, and in *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, where it is said, in construing the Union Pacific grant there involved:

“By the terms of the act making the grant the contention of the defendant is not supported. Those terms import the transfer of the present title, not one to be made in the future. They are that ‘there be and is hereby granted’ to the company . . . No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions.”

We find the same principle announced in *Leavenworth etc. R. Co. v. United States*, 92 U. S. 733. In construing the act of March 3, 1863, granting alternate sections of land to the state of Kansas for the purpose of aiding in the construction of certain railroads and telegraphs in that state, the language of the grant was, “that there be and is hereby granted to the state of Kansas.” In defining the grant, the court said it should neither be enlarged by ingenious reasoning nor diminished by strained construction.

“It creates an immediate interest, and does not indicate a purpose to give in future. ‘There be and is hereby granted’ are words of absolute donation, and import a grant *in praesenti*. This court has held that they can have no other meaning; and the land department, on this interpretation of them, has uniformly administered every previous similar grant (citing cases). They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain,

and by relation has the same effect upon the selected parcels as if it had specifically described them."

These, and other cases that might be cited, sufficiently indicate the rule applied to grants of this character by the supreme court of the United States, that such grants are *in praesenti*, and that, when the sections granted are definitely located by survey, the grant takes effect by relation as of the date of the act of Congress, and passes the title as fully as though the sections had been capable of identification. *Van Wyck v. Knevals*, 106 U. S. 360.

This principle, as now applied, while not directly involved in any case heretofore submitted to this court, has been recognized and approved in *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784, where, in construing the language of the grant in the enabling act, it was held that § 10 of that act made a present grant of sections 16 and 36, to take effect as soon as the state was organized. In *State v. Johanson*, 26 Wash. 668, 67 Pac. 401, in construing the various acts under which Congress had indicated its grant of school lands to the state, it was asserted that the purpose of such grants was that the state might have sections 16 and 36 for school purposes upon its admission into the Union, or any equal quantity of land, should it be found that the government could not for any reason grant these two sections to the state when the state should be admitted. See, also, *Northern Pac. R. Co. v. Miller*, 20 Wash. 21, 54 Pac. 603.

In *Balderston v. Brady*, 17 Idaho 567, 107 Pac. 493, in defining the power of the board of state land commissioners to relinquish the state's title to sections 16 and 36, the court took occasion to refer to our enabling act and the nature of the grant thereby created, and while it was conceded by the court that what it then said was collateral and incidental to the point, and therefore of no authoritative value, yet the language is so pertinent, and the reasoning so clear and forceful upon the issue here presented, that we quote it for

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its argumentative force. At page 583 of its opinion, the court says:

"There is nothing in the entire admission bill which negatives the idea of a present grant. The grantee was in existence at the time of the passage of the act, and the lands were in the state, some surveyed and others unsurveyed. The fact, however, that the land was not surveyed could make no difference where the numbers of the sections were specifically given. The title to unsurveyed lands may be as readily conveyed as that to surveyed lands. It is a maxim of law that that is certain which is capable of being made certain . . . All that remained to be done in order to identify these lands on the ground was to have the survey extended over them. The description in the grant was definite and certain. So far as we are aware, it has been the uniform holding of the supreme court of the United States that such grants are grants *in praesenti*, and immediately vest title in the grantee. The principle if not the only exceptions to this rule are *Heydenfelt v. Daney, G. & S. M. Co., supra*; *Hall v. Russell*, 10 U. S. 503, 25 L. Ed. 829, and *Rice v. Minn. & N. W. R. Co.*, 66 U. S. 358, 17 L. Ed. 147. The *Heydenfelt* case so far as we can find has never been referred to by the supreme court but once (*New York Indians v. United States*, 70 U. S. 18, 18 Sup. Ct. 531, 42 L. Ed. 927), and it was there mentioned as one of the rare exceptions to the general rule in construing land grants. The cases to the contrary are too numerous to attempt to collate them all (citing many cases). A holding that the state, hampered as it always is in such matters, was intended to run a race with settlers, land scrip brokers, railroad companies, and timber and stone land grabbers to secure the remnant and refuse of the public domain as lieu and indemnity lands for all its best and most valuable school land sections 16 and 36, would render sections 4 and 5 of the admission bill only a delusion and an idle declaration. There remained about forty-four million acres to survey. If title vested in the state to the school sections only that had been surveyed, the state was getting merely the barest contingency for the unsurveyed sections, notwithstanding the declaration in the act that, whether surveyed or unsurveyed, such lands should not be subject to any kind of entry."

The situation in Washington as to unsurveyed lands was similar to that in Idaho, and if its title vested only to the lands surveyed at the time of its admission, and to such other lands as, when subsequently surveyed, had not been taken under some form of public entry, then the bounty of the Federal government was a notable instance of generosity in reserving to the state only such lands as were of insufficient value to tempt the locator under public entry; for it is a matter of general knowledge that, long before the government had or could extend its survey over the unsurveyed lands in this state, all such lands as were valuable for any purpose had long since been located under some form of public entry.

Coming now to an examination of the case of *Heydenfeldt v. Daney Gold & Silver Min. Co.*, 93 U. S. 634, urged by respondent as strongly sustaining the judgment, the language of the act then under construction, § 7 of the act of March 21, 1864, 13 Stats. at Large, 30, was:

“And be it further enacted that sections numbered 16 and 36 in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said state (Nevada) for the support of common schools.”

It was held that, because of the words of qualification in said section, a restriction was made upon a present grant, and that it must be held that it was the intention of Congress to indicate only a grant *in futuro*. It was frankly admitted by the court that the language of the section was ambiguous, and that there could be no reconciliation if the words used received their usual meaning and were held to be words of present grant. The court then asserts that its interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit, and then goes on to say that, because of their great mineral wealth, Congress intended lands in Nevada containing mineral should be disposed of

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differently from agricultural lands, although no method of doing so had yet been provided; and that to secure adequate protection to those engaged in mining was the purpose of the qualification. That is, as we understand the reasoning, if upon survey of any section 16 or 36, it should be found that such lands were then claimed under mining location, or had in some way been disposed of for such purposes, it would be the policy of the general government to protect such locations, and the state must select other lands equivalent thereto; the court adding: "The whole country is interested in the development of our mineral resources, and to secure it adequate protection was required for those engaged in it;" and then it is shown such protection was granted under the act of July 26, 1866, under which the United States had disposed of the land in question as mineral land, prior to its survey. It does not seem to us that the reasoning of the court, as applied to mineral lands and the necessity for furnishing adequate protection to those engaged in mining, which is the basis of the decision in the *Heydenfeldt* case, should apply to purely agricultural lands taken under homestead entry, such as those we are now dealing with. The *Heydenfeldt* case was decided in 1877. Our enabling act was approved February 22, 1889, and was the first Federal grant of lands to new states subsequent to the decision in that case. Could we not assume that, at the time it chose the language of our enabling act, Congress had in mind the decision in the *Heydenfeldt* case, and because thereof incorporated into § 11:

"Such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Whether the decision in the *Heydenfeldt* case had any influence over Congress or not in choosing its language in § 11, what other construction can be given to these words than that Congress meant to emphasize its intention to make a present

grant, and to put it beyond any future controversy or necessity of construction by courts or land departments, that the United States did forever thereby relinquish all its title, and such lands should thereafter be subject to no form of entry under Federal sanction, whether surveyed or unsurveyed? We therefore hold that the words of grant in our enabling act are words of present grant, and that when, by the adoption of its constitution, the state affirmed the provisions of the enabling act and such constitution was approved by the United States, and the state of Washington thereupon fully admitted into the Union, the grant defined in the enabling act took effect as of its date, and passed the entire title of the United States as fully and completely as though such sections 16 and 36 had been previously surveyed and were then capable of exact identification.

This brings us to the second question in the case, the effect of the act of 1891, as a modification or restriction upon the enabling act. The act of February 28, 1891 (26 Stats. at L. 796), was an amendment of the act of February 26, 1859 (11 Stats. at L. 385), and so far as is here material, is as follows:

"Where settlements with a view to preemption or homestead have been or shall hereafter be made, before the survey of the lands in the field which are found to have been on sections 16 or 36, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved or pledged for the use of schools or colleges in the state or territory in which they lie, other lands of equal acreage are hereby appropriated and granted and may be selected by said state or territory in lieu of such as may be thus taken by preemption or homestead settlers. . . . That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands . . . within the state or territory where such losses or deficiencies of school sections occur . . ."

The act of 1859 was a general act relating to preemptions, and it was therein provided that:

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"Where settlements with a view to preemption have been made before a survey of the lands in the field which are found to have been made on sections 16 and 36, those sections shall be subject to the preemption claim of such settler."

Provision was then made for the appropriation of lieu lands. This act being general in its nature, there could be no doubt that, when Congress in 1889 passed our enabling act, which was unquestionably a special act applying only to the states of North and South Dakota, Montana, and Washington, providing that sections 16 and 36 should not be subject to entry under any land laws of the United States, this worked an exception and withdrew the lands in these four states from the operation of the general act. This was the construction placed upon these two acts by the secretary of the interior February 20, 1890, L. & R. 84, p. 209, holding that the language of the acts being in direct conflict, the latter should prevail and the grants to the four states named in the special act should be determined and governed by such act. Subsequently, and on April 22, 1891, the secretary held that the amendatory act of 1891 should control, upon the ground that it was intended by the latter act to provide a uniform rule applicable to all the states and territories having grants of school lands. If, however, we are correct in our holding that the United States had, prior to the act of 1891, parted with its title and control over these two sections, except for the purpose of identification by survey, Congress could thereafter pass no law affecting such lands, as they had already been severed from the public domain by the enabling act and the admission of the state thereunder. The language of Secretary Noble in construing these two acts (February 26, 1889, and the enabling act of February 22, 1889), as above referred to, in his first ruling, is so apt upon the contention with which we are now dealing that we quote it:

"The terms of these two laws are so directly opposed to each other, and the language of the latter specific act is so

clear and positive, that it seems impossible to avoid the conclusion that it was the intention of the lawmakers that the provisions thereof should take the place of the former general law on the subject. If the language used in this granting act were uncertain or ambiguous, making it difficult to determine the intent of the legislature, we might be justified in looking outside of and beyond said act for assistance in determining the meaning of the words used. I am of the opinion that no such necessity exists here, and that the language used gives no occasion for construction."

We fail to find anything in the act of 1891 to destroy the force of this reasoning, or its application. The only effect of the amendment of 1891 was to extend the provisions of the act of 1859 to homestead as well as preemption entry, and was applicable to all lands then within the public domain. It could not, however, apply to lands previously withdrawn from the public domain and, either by special or general grant, passed under the dominion of others, either individuals or states. Again, it will be noted that the act of 1891 is a general act, making no reference by its terms to the special or enabling act of 1889. It has uniformly been held that a general act will not repeal a prior special act unless the intent to so repeal is clearly manifest. Assuming, then, that the two statutes have the same subject, the one being special and the other general, there can be no implication of an intent to repeal the special act by the latter general act, unless it is apparent that the two acts cannot stand together, and effect be given to both. There is no difficulty in applying this general rule to these two acts. The special act is intended to apply to a particular situation in a particular and designated locality only. It is not intended as a general law, but by its terms is limited in effect to the selections with which it deals and the localities it describes. The general law has no limitation. It applies wherever there are lands within the public domain subject to its terms. There is no conflict between the two, nor is there

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an impossibility of construing the two so that both shall stand and be fully effective.

“Repeals by implication are not favored, and a statute will not be construed as repealing a prior act on the same subject, in the absence of express words to that effect, unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand, and to comprise in itself a sole and complete system of legislation on that subject.” *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91.

Various expressions of the same rule are to be found in the authorities cited in the *Callvert* case, and in *Tacoma Land Co. v. Pierce County*, 1 Wash. 482, 25 Pac. 904; *State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 104 Pac. 791; 26 Am. & Eng. Ency. Law (2d ed.), 739-741; 36 Cyc. 1151; Lewis, Sutherland, Stat. Constr., §§ 268-274; Endlich, Interpretation of Statutes, 152; Black, Interpretation of Law, 116.

There is no irreconcilable repugnancy between the two acts, and it seems to us absurd to say that, in amending an act whereby the right of homestead entry was extended to lands theretofore subject only to preemption, Congress intended to repeal an enabling act under which four states were admitted into the Union. The two subjects are so dissimilar that it cannot be held, in the absence of any clear expression to that effect, that, in the passage of the latter act, Congress had the former in mind, and was intending to withdraw the special exception granted these four states; and that having created an exemption from any form of public entry as to sections 16 and 36, as one of the conditions of the proposal under which the privilege of admission was extended to the states, as soon as this proposal was accepted by the people and the constitutions they had framed had been approved, and thus a solemn compact entered into between the states and the United States, whereby each contracted to hold inviolate the rights of the other, Congress sought to withdraw any portion of its proposal and to again restore these two

sections to the public domain. To so hold is to our mind to accuse Congress of bad faith.

Neither can we accede to the contention that Congress could, by subsequent enactment, restrict or change the grant made in the enabling act. Neither upon principle nor authority can such a contention be sustained. In *Leavenworth etc. R. Co. v. United States*, *supra*, it was held that, where the right of an Indian tribe to the possession and use of certain lands as long as it might choose to occupy them was assured by treaty, Congress could not subsequently make an absolute grant of the lands to aid in building a railroad; that to do so would be to violate an express stipulation not within a grant of land in general terms, and that "specific language leaving no room for doubt as to the legislative will, is required for such a purpose;" affirming the doctrine of *Wilcox v. Jackson*, 13 Pet. 498, and quoting approvingly:

"We go further, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace, or operate upon it; although no reservation were made of it."

The same doctrine is adhered to in *Beecher v. Wetherby*, 95 U. S. 517, where a contest over the possession of logs cut on section 16 arose between the plaintiff, who claimed to be the owner of the logs by virtue of sundry patents of the land from which they were cut issued to him by the United States in October, 1872, and the defendant, who asserted ownership of the logs under patent of the land issued by the state of Wisconsin in 1870. The question for determination, therefore, was, which of these patents transferred the title to the land. The state asserted its title to section 16 under the compact upon which it was admitted into the Union, under which section 16, in every township not otherwise disposed of, "shall be granted" to the state for the use of

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schools. The court, after referring to the proposition respecting grants of land contained in the enabling act, and the acceptance of these propositions by the people of the state in framing a constitution, subsequently ratified by the United States, as forming an unalterable compact, goes on to say:

"It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the state."

So in *Busch v. Donohue*, 31 Mich. 480, Cooley, J., says, "A grant by Congress to a state is no more subject to be recalled at the will of Congress than a grant to an individual." To the same effect are: *Rutherford v. Greene's Heirs*, 2 Wheat. 196; *State ex rel. Kittel v. Jennings*, 47 Fla. 302, 35 South. 986; *St. Paul etc. R. Co. v. Winona etc. R. Co.*, 112 U. S. 720; *McGee v. Mathis*, 4 Wall. 143; *Fletcher v. Peck*, 6 Cranch 87; *Terrett v. Taylor*, 9 Cranch 43; *State v. Delesdenier*, 7 Tex. 76; *Spaulding v. Martin*,

11 Wis. 272; *Courtright v. Cedar Rapids & M. R. Co.*, 35 Iowa 386; *County of Cass v. Morrison*, 28 Minn. 257, 9 N. W. 761; *United States v. Curtner*, 38 Fed. 1, and many others.

We cannot now make further reference to the authorities relied upon by respondents to sustain the judgment. They have been studied and regarded with reference to the rules therein announced. In so far, however, as in the California cases, they would seem to indicate contrary conclusions to those we have announced, we prefer not to follow them, based as they are upon stipulations differing from those we have considered as establishing the decision we have reached.

Respondents submit no argument or authority in support of the plea of estoppel. We therefore do not discuss that feature of the answer, further than to say there could be no estoppel as against the state by reason of the facts pleaded.

The judgment is reversed, and the cause remanded with instructions to sustain the demurrer.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9456. Department Two. January 4, 1912.]

Bo SWEENEY, *Respondent*, v. LEWIS CONSTRUCTION COMPANY
et al., *Appellants*.¹

CORPORATIONS—REPRESENTATIONS—CONTRACT—INDIVIDUAL LIABILITY OF OFFICERS. The evidence sufficiently shows that a contract was made by the plaintiff direct with a corporation, rather than with its officers individually, where negotiations were carried on in the name of the corporation and plaintiff's offer and letters were addressed to it.

CONTRACTS—REGRADE OF LOTS—WAIVER OF DAMAGES—CONSTRUCTION. A contract waiving damages from a regrade about to be made, contemplates only future damages, where there was evidence that no substantial damages had theretofore been sustained and no claim had been made therefor.

¹Reported in 119 Pac. 1108.

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CONTRACTS—REGRADE OF LOTS—BREACH—MEASURE OF DAMAGES. Under a contract waiving damages to property from a contemplated regrade, to be completed within a specified time, on breach of the contract upon its becoming impossible to complete the regrade within the time, the work being abandoned, measure of damages to be recovered by the property owners is the difference in the value of the lots before the commencing of the work and their value when work was suspended, eliminating changes in market values, together with damages to buildings and loss of rentals; and not the cost of completing the work irrespective of the value of the property.

Appeal from a judgment of the superior court for King county, Yakey, J., entered September 12, 1910, upon findings in favor of the plaintiff, in an action for breach of contract, after a trial before the court without a jury. Reversed.

Harold Preston, Leander T. Turner, and Sandford C. Rose, for appellants.

Dorr & Hadley, for respondent.

Crow, J.—Action by Bo Sweeney against Lewis Construction Company, a corporation, W. H. Lewis, and Charles S. Wiley, to recover damages for breach of an alleged contract. The trial court made findings and entered judgment in plaintiff's favor for \$30,500. The defendants have appealed.

After trial, and prior to entry of judgment, the death of Charles S. Wiley was suggested. Thereupon Clifford Wiley, his administrator, was substituted as party defendant, and now joins in the prosecution of this appeal. The respondent, Bo Sweeney, is the owner of four lots in block 62, of Kidd's addition to the city of Seattle. These lots, located on what is known as North Beacon hill, were at so great an elevation that it was considered that they and all other property in that immediate neighborhood would be improved and advanced in value by regrading to a lower level. The appellant W. H. Lewis, and Charles S. Wiley, now deceased, purchased a number of lots in the same locality, and about the year 1903 had a contract with the Seattle & Montana Rail-

way Company to fill tide lands, which contract they were performing by sluicing earth from their Beacon hill lots and other property. In May, 1904, Lewis, Wiley and L. T. Turner, their attorney, organized the appellant corporation, Lewis Construction Company, with a capital stock of \$2,000, divided into one hundred shares of the par value of \$20 each. Lewis and Wiley subscribed for forty-nine shares each, and Turner subscribed and paid for two shares. Lewis and Wiley paid their stock subscription by transferring to the corporation their sluicing plant, which was of a greater value than \$2,000. Thereafter the sluicing and regrading was done by the Lewis Construction Company, under a subcontract from Lewis and Wiley, who collected fifteen cents per cubic yard from the railroad company and paid the construction company from five to ten cents per cubic yard for doing the work. About the same time, Lewis and Wiley organized another corporation, known as the Beacon Place company, with a capital stock of \$12,000, and in payment of their stock subscriptions transferred to it their North Beacon hill real estate of that value.

The regrading operations on North Beacon hill extended over platted streets and private property of other parties in the neighborhood. For this purpose it became necessary to obtain permits from the city and owners of abutting property. At first permits and licenses, together with the right to use city water, were obtained in the name of Lewis, but later in the name of the Lewis Construction Company, which in its operations, without the formality of any written transfer, used those obtained by Lewis. That portion of North Beacon hill involved in this action had platted streets running east and west, named from north to south as follows: Lane street, Dearborn street, Charles street, and Norman street. A portion of Dearborn street was condemned about the time the improvements here involved were under consideration. There were also cross-avenues running north and south, named from west to east as follows: Tenth avenue

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south, Eleventh avenue south, and Twelfth avenue south. Respondent's lots fronted on the south side of Charles street and the west side of Eleventh avenue south, near the center of the district.

On February 15, 1906, Ordinance No. 13,320 of the city of Seattle was approved. This ordinance provided for widening, extending and establishing Dearborn street, for changing and lowering its grade, the grade of Tenth avenue south, and the grades of other streets, and for condemning and damaging property necessary for these purposes. While this ordinance affected other streets and avenues, it did not establish any grade for Charles street, Eleventh avenue south, or Twelfth avenue south. The grades thus established for Dearborn street and Tenth avenue south, within the district mentioned, called for cuts of at least one hundred feet—at some points more, at others less. We need not give exact figures. The cuts were to be very deep.

About the time these street grades were adopted, there was a general discussion and consideration by city officials and property owners, including parties to this action, of the advisability of a general regrade of the North Beacon hill district. Appellants were desirous of lowering the level of property owned by the Beacon Place Company, and also of obtaining earth to be used by the Lewis Construction Company in filling the tide lands. Respondent also seems to have been desirous of having the grade of his lots and the adjoining streets lowered to correspond with the adopted grades of Dearborn street and Tenth avenue south, if done without expense to him and within a definite time. Considerable negotiation occurred between respondent and Lewis and Wiley, officers of the appellant Lewis Construction Company. The construction company submitted and suggested to respondent written offers running to it from him. None of them were satisfactory to respondent. On April 16, 1906, respondent prepared and delivered to appellant Lewis Construction Company the following proposal, which he now

claims is the contract on the breach of which this action is predicated:

"Lewis Construction Co.,

April 16, 1906.

"Seattle, Washington.

"Gentlemen: Replying to your communication of the 12th inst., I wish to say that I am desirous that Charles street between Tenth and Twelfth avenues be reduced to the same grade as Dearborn street, as provided for in Ordinance No. 13,320 and also of Eleventh avenue to the same grade as Tenth avenue, as provided in said Ordinance No. 13,320. I therefore wish to advise you that if the same shall be reduced to grade as above indicated, and that my lots numbered one, four, five, and the north one-half of lot two, and the south one-half of lot three, in block sixty-two, Kidd's addition to the city of Seattle, are at the same time reduced to the same grade, as the streets above named, I shall and will waive all claims for damages to said property; provided, however, that said grading is done and completed on or before January the first, 1907. Yours truly, Bo Sweeney."

This offer was not acceptable to the appellant construction company, to which respondent was to make no payments for lowering the grade; but, a few days later, Mr. Lewis telephoned respondent that he thought it would be satisfactory. Immediately thereafter the appellant construction company entered upon respondent's lots and the adjoining streets, and by sluicing lowered their grade to a considerable extent, but far short of the grades of Dearborn street and Tenth avenue south. Respondent had some small tenement houses upon his lots, which he claims were so completely damaged by the regrading as to render them worthless and unfit for occupancy. Shortly before January 1, 1907, the appellant construction company ceased the work of regrading, and thereafter refused to continue. Respondent prosecuted this action for the breach of the contract, not only against the appellant construction company, but also against Lewis and Wiley individually, his contention being that he never knew of the existence of the construction company; that he understood he was dealing with Lewis and Wiley, and that he

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looked to them only. Appellants claim he dealt with the corporation. The trial judge substantially found the corporation was a pretense and subterfuge; that appellants Lewis and Wiley were the contracting parties, and entered judgment against them as well as against the corporation.

The record is voluminous, and we cannot, within the limits of an opinion of reasonable length, state the evidence in detail. We conclude, however, that respondent was dealing with the corporation only. His letter was addressed to it. The proposals previously drafted by it and submitted to him for his signature were also addressed to the corporation. Attached to one of them was a blank form of acceptance, reading as follows: "The foregoing is acceptable to us and we agree to the conditions therein contained.

"Lewis Construction Company,
"By....., President."

It clearly appears from the evidence that the Lewis Construction Company was regularly incorporated under the laws of this state; that its stock was fully subscribed, paid and issued; that its articles of incorporation were of record in the office of the auditor of King county; that a list of its officers was also certified to and filed with the county auditor; that permits were granted it by the city of Seattle; and that it did the regrading on North Beacon hill at all times after its incorporation. While it is true that respondent talked with the individuals Lewis and Wiley, they were officers of the corporation, which could act only through them. The respondent could not talk to the entity known as a corporation. Lewis and Wiley claim they represented the corporation as its officers. Every writing that passed between the parties prior to the commencement of the work mentioned the corporation as the contemplated contracting party. The respondent himself prepared and addressed the identical letter on which he predicates this action. The evidence shows him to be an attorney of active practice. The name used by him in addressing his letter should have chal-

lenged his attention. There is no evidence of any investigation on his part as to who constituted the Lewis Construction Company, or whether it was a corporation or partnership. Respondent's testimony was that he gave the matter no thought. It was his place to give it thought, and to know the party with whom he was dealing. There is no suggestion in the evidence that Lewis and Wiley, or either of them, attempted to deceive him or in any way perpetrate a fraud upon him by inducing him to contract with the corporation, under the impression that he was contracting with them as individuals. It might be that the corporation would make a contract which the individuals would not make. It is suggested that the appellants Lewis and Wiley are also lawyers, but that fact cannot change respondent's situation. He is predicated his action on an alleged written contract drawn by himself, addressed to the corporation and accepted by it. The evidence is insufficient to hold Lewis and Wiley to individual liability. As to them, the action should have been dismissed.

It is apparent the partial work of regrading respondent's lots was done in pursuance of permission granted by his letter of April 16, 1906. Whether the proposal therein contained was followed by such a complete acceptance by the appellant corporation as to impose upon it an unconditional obligation to grade the lots to the depth mentioned by January 1, 1907, is sharply contested. We think sufficient acceptance was shown on appellants' part to complete a contract, but that the vital questions on this appeal are, (1) how should that contract be construed, and (2) what should be the measure of any damages respondent may have sustained.

There is some dispute as to what damages were to be waived, whether past, future, or both. Respondent contends appellants had theretofore damaged him by work done without his license or permission, and that the contract was for a waiver of his claim for those as well as future damages. Appellants insist no substantial damages had theretofore been

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sustained by respondent; that he had made no claim for past damages, and that they were neither discussed nor mentioned during the preliminary negotiations. From the evidence we conclude that future damages only were contemplated in the waiver:

The appellants introduced evidence sufficient to show that it was impossible for the construction company to complete the grade to the contemplated level within the time named, for the reason that no improvement of Dearborn street or Tenth avenue south was ordered prior to January 1, 1907; that no plans for a general regrading of North Beacon hill were perfected; that a city water main was laid in Twelfth avenue south; that if respondent's lots, Charles street, and Eleventh avenue south, had been lowered to the contemplated depth, the entire eastern portion of North Beacon hill, including Twelfth avenue south, would have been deprived of support, and by an avalanche would have been precipitated on respondent's property, destroying the water mains and damaging not only respondent's lots but all of that locality. Respondent contends appellants knew, when making the contract, that its full performance might become impossible, but that they failed to communicate that knowledge to him. We fail to understand why he did not possess the same knowledge. The entire scope of the evidence shows the parties were all acting in contemplation of the probable adoption of a general regrading scheme, the perfection of which would be necessary to a complete performance of the contemplated work of regrading respondent's lots in accordance with his wishes. They all must have known respondent's lots could not be graded to the contemplated depth, if, perchance, that general scheme should be abandoned or fail to materialize. It did so fail, rendering it impossible for the construction company to complete the regrading. Under these circumstances, how should the contract, not clear in its terms but somewhat ambiguous, be construed. Our construction is that respondent contracted, not to settle past claims for dam-

ages which were nominal if they existed at all, but to waive all future damages which might result to his property, especially his buildings, should the grade be fully completed within the stipulated time; but that, if for any reason the grade could not or should not be thus fully completed, he would not waive his claim for damages but would be entitled to prosecute the same. We cannot conclude that the appellant construction company, knowing the uncertainties of the situation, unconditionally agreed to reduce the lots to the stipulated grade within the time named; but do conclude that it did agree that, in the event of its failure to complete the work, respondent should be entitled to prosecute his claim for such damages only as might result to his lots and buildings by reason of any partial regrade that might be made. The appellant construction company could not, and did not, reduce respondent's lots to the desired grade, and his claim for such damages remained unimpaired and available to him.

Appellants, as affecting the measure of damages, offered evidence to show that respondent's lots had been improved by the partial regrading, rather than injured. This evidence was rejected by the trial judge. Appellants' theory was that respondent's injuries, if any, should be measured by the difference in the value of his lots before the construction company commenced work and their value when it suspended, together with damages to his buildings and his loss of rentals. This theory was also rejected by the trial judge. Respondent contended, and the trial court held, that he was entitled to recover for injuries to his buildings, for loss of rentals, and also for the actual cost of completing the grade to the contemplated depth. Applying this rule, the trial court admitted evidence offered by respondent, and found the number of cubic yards of dirt yet to be removed, the cost per yard, and, as this exceeded the total damages demanded by the complaint, awarded judgment for the full amount asked. There is no evidence of the value of respondent's lots before the regrading was commenced, after it was abandoned, or at any

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other time. It might be that their value never equaled the damages awarded, and that they would not appreciate to that value if actually regraded as contemplated and desired by respondent. For all that appears from the evidence, it is possible that respondent's judgment for \$30,500 may exceed the value of his lots in their former condition, their present condition, or the condition in which they would have been had the regrading been completed to levels corresponding to the established grades of Dearborn street and Tenth avenue south. Yet, on an affirmance of the judgment herein, respondent would not only recover the damages awarded, but he would at the same time retain his lots, the value of which might not have been depreciated to any considerable extent by appellants' alleged breach of contract. We do not know that such a condition would result from an enforcement of the judgment entered, nor do we know the contrary. The action should have been, but was not, so tried as to avoid the possibility of such a result. Evidence offered by appellants in support of what they contended to be the proper measure of damages should have been admitted, and after hearing all the evidence, the trial judge should have awarded such damages only as would be necessary to compensate respondent. He is not entitled to avail himself of appellants' alleged breach of contract for speculative purposes, and thereby recover damages largely in excess of any loss he may have actually sustained. This he may not have done. Yet appellants were deprived of their right to introduce evidence applicable to their theory of the case. Punitive damages are not recoverable in this state. Compensatory damages only may be awarded. In any given case, that measure of damages should be applied to the facts and circumstances shown which will result in full compensation to the injured party without punishing his adversary.

In *Bigham v. Wabash-Pittsburg Terminal R. Co.*, 223 Pa. 106, 72 Atl. 318, the defendant failed to fill plaintiff's lots to the extent contemplated by the alleged contract. The

trial court held the measure of damages to be the cost of completing the fill, and directed a verdict accordingly. The defendant contended the proper measure of damages was the difference in the value of the lands with the fill completed and their value at the time of the breach of the contract when they were partially filled. In reversing the judgment the appellate court said:

"It has been well said that it is difficult to point out in advance what the true measure of damages should be under a given state of facts. If there be different modes of measuring damages, depending on the circumstances, the court should first hear the evidence and instruct the jury afterwards as to the proper measure to be applied. The underlying principle in such cases is that the damages must be such as might naturally be expected to follow a breach of the contract, keeping in mind the benefit which the contracting parties had in contemplation when the agreement was entered into. . . . In this respect what was said in *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642, applies: 'It may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of damages; or it may be that the cost of removal would be much greater than the injury by the deposit when the true measure would be the difference in value merely.' The question of the proper measure of damages must always be taken into consideration by the court in the proper disposition of any case wherein damages are claimed. *Wilkinson v. North East Borough*, 215 Pa. 486, 64 Atl. 734."

From the contract itself and the attending circumstances, we cannot conclude the appellant corporation, or the respondent, or either of them, when the work on respondent's lots was commenced, contemplated the actual cost of the completion of any possible unfinished regrade as an element of damages, or as a test to be applied in measuring any damages respondent might sustain and which he only agreed to waive upon condition that the regrade should be completed within the time mentioned and as desired by him. The appellant corporation was entitled to have the damages meas-

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ured by that method which would minimize its liability and at the same time secure to respondent a just, fair, and complete compensation. If the extent of such compensation could be ascertained and its reasonable limitations determined from evidence offered by appellant in support of the measure of damages for which it contended, that evidence should have been admitted and a proper measure of damages should have been predicated thereon. Mr. Sutherland, in the third edition of his work on Damages, at § 12, says:

"The principle of just compensation is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception."

At § 45 he further says:

"In an action founded upon a contract, only such damages can be recovered as are the natural and proximate consequence of its breach; such as the law supposes the parties to it would have apprehended as following from its violation if at the time they made it they had bestowed proper attention upon the subject, and had full knowledge of all the facts. As otherwise expressed, the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into."

Adopting the principles thus announced, we hold, under the peculiar circumstances of this case, that the appellant corporation was entitled to have that measure of damages applied which would protect it and which at the same time would fully compensate respondent for any actual loss he may have sustained. The evidence offered by appellants was therefore competent. Had it been admitted and had its weight and credibility been sufficiently convincing to show that the decrease in value of respondent's lots, resulting from the partial regrading coupled with damages to his buildings and

his loss of rentals, would have been less than the cost of completing the regrading to the contemplated depth desired by respondent, then the measure of damages for which the appellant corporation contended should have been adopted and applied by the trial court; as it would compensate respondent for all losses by him sustained, and at the same time protect appellant from punitive or speculative damages being imposed upon it for its alleged failure to complete a contract which, without fault on its part, became impossible of full performance, a contingency which it is manifest all the parties contemplated. In admitting evidence of values of the lots prior to and after the partial regrading, any increase or decrease that may have resulted from changes such as a rise or fall in general market values should be eliminated and ignored. In other words, only such changes in values should be considered as were produced by, or directly resulted from the partial performance of the work of regrading.

Although this cause is now before us for trial *de novo*, we cannot enter final judgment, in the absence of competent evidence which was offered by appellants and erroneously excluded by the trial judge. The judgment is therefore reversed, and the cause is remanded with instructions to dismiss as to W. H. Lewis and Clifford Wiley, administrator of the estate of Charles S. Wiley, deceased, and for a new trial between respondent and the Lewis Construction Company.

DUNBAR, C. J., MORRIS, ELLIS, and CHADWICK, JJ., concur.

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Opinion Per MOUNT, J.

[No. 9838. Department One. January 5, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. S. N. ROBERTS,
Appellant.¹

RAPE—CORROBORATION—EVIDENCE—SUFFICIENCY. In a prosecution for rape, the testimony of the prosecutrix that she was violently assaulted by the defendant is not sufficiently corroborated, where she allowed the defendant to escort her home, invited him in and entertained him at luncheon with her mother, without making any complaint, the only corroboration being the testimony of her mother that when they arrived her dress was pulled out of her belt, hair on sideways, and "their faces pretty red on one side" (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 13, 1911, upon a trial and conviction of rape. Reversed.

Nuzum & Nuzum, O. B. Setters, and Geo. H. Armitage,
for appellant.

John L. Wiley and O. J. Saville, for respondent.

MOUNT, J.—The defendant was charged with the crime of rape. Upon a trial, he was found guilty by a jury, and was sentenced to a term in the penitentiary. He appeals from that judgment.

At the close of the evidence for the state, counsel for the defendant moved the court for a directed verdict. The court denied this motion, saying:

"All I see is, they were together that night, left home that night, came back that night; and the fact of pregnancy, the clothes disarranged. . . . That's all I can see. I do not think a conviction can stand on this testimony. . . . I will overrule the motion and see what the case develops. Unless I change my mind, I will grant a new trial. I will overrule the motion and examine these authorities."

¹Reported in 119 Pac. 836.

Thereafter nothing was proven which in any respect strengthened the case for the state. The defendant admitted that he was acquainted with the prosecuting witness, and by not denying her statements, virtually admitted that he had spent several evenings in her company between December 13, 1910, and January 2, 1911, but denied that he had ever had sexual intercourse with her, or had ever been engaged to marry her. He also produced evidence tending to discredit her statements as to the time and place where she said the act was committed.

We are satisfied that the trial court should have granted the defendant's motion and dismissed the case. The prosecuting witness testified, in substance, that she first met the defendant on December 13, 1910. She was at that time seventeen years and ten months of age. He was a young man. The record does not disclose his age, but he is referred to as a boy. The prosecuting witness was employed as a clerk in a department store. The defendant was employed at a soda fountain in the same store. Two or three days after they met, they attended a neighborhood party together. A few days later, she says, he asked her to become his wife, but she did not accept this offer until the evening of December 24, 1910. On the evening of December 26, they went together to a theater. They left the theater about 9:15 p. m., and took the street car for home. They got off the car when about three blocks from her home. Defendant asked her to go to his brother's house, which was near by and which was a little house of three rooms. Other small houses were located near by this. She went with him. They went inside, defendant locking the door. She then said:

"I asked him why lock the door, and he said he did not want any one to come while we were there, and then he took hold of me and started to use me in a manner I did not think was right. I told him to leave me alone, and I struggled and hallooed and screamed. I did everything I could. . . . He took me into the bed room, or at least forced me in there. He threw me on the bed and had sexual intercourse with me.

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Q. Did anything else occur there that you have not spoken of? A. Yes, sir. I thought if I could get my hat pins I could help myself. I went to grab for them and he interfered, got ahead of me, took my hat pins and threw them on the floor and took my hat away."

After this happened, the defendant took her home, which was about three blocks away. She invited him into her mother's house where he went, and she and her mother and the defendant had lunch there together. She also testified that, on January 2, 1911, the same thing occurred at the same place, in substantially the same way. The mother of the prosecuting witness testified to the appearance of her daughter and the defendant when they arrived home on the evening of December 26, as follows:

"The first thing I noticed that they were home sooner than usual. I made the remark, 'Why home so soon?' and he said the Washington got out sooner than the Spokane. I also noticed that my daughter's dress was pulled out of her belt, hair all on sideways, and she looked dreadful. 'What was wrong?' Mr. Roberts said they got out at Gordon and walked three blocks to the house. Q. Anything said there about it being unusual with reference to their appearance? A. I noticed that their faces were pretty red—on one side, and I asked my daughter—I couldn't help looking at her—I said, 'What is the matter with your face?' Roberts said they had been walking rather fast, got off the car because it was crowded, and walked home. Q. Was that about all that was said between you? A. Yes, all that I remember. Q. How long did Mr. Roberts stay that evening after coming home? A. Stayed long enough to have lunch. I presume twenty minutes or half an hour."

This is all there is in the record to corroborate the story of the prosecuting witness that she had been ravished by the defendant, on that evening or at any time. We are satisfied that this is not such evidence as supports the testimony of the prosecuting witness. The girl's story is very improbable. If she was violently assaulted, as she says she was, it is not reasonable that she would let her assailant escort her

home, and on their arrival there, invite him into the house with her mother and there entertain him at luncheon. This story is so unreasonable as to lead to the conclusion that defendant did not assault her at all; or, if he did so, it was with her consent. In either event, the fact that the dress of the prosecuting witness was pulled out of her belt, hair on sideways, and "their faces were pretty red on one side," is no evidence, or even a circumstance, tending to prove that the crime had been committed. These things might have all occurred and the parties be entirely innocent of wrong. If the daughter had made a complaint at that time, as she undoubtedly would had her story been true, then these circumstances might have had some weight as corroborating circumstances. But when no complaint was made, we think they are of no corroborative force. In *State v. Gibson*, 64 Wash. 181, 116 Pac. 872, we said:

"The evidence offered in support must have some real supporting force. It must be something more than a colorable support."

citing *State v. Powell*, 51 Wash. 372, 98 Pac. 741; *State v. Stewart*, 52 Wash. 61, 100 Pac. 153; *State v. McCool*, 53 Wash. 486, 102 Pac. 422, 132 Am. St. 1089; and *State v. Crouch*, 60 Wash. 450, 111 Pac. 562.

The judgment is reversed and the cause ordered dismissed.
DUNBAR, C. J., PARKEE, and GOSE, JJ., concur.

FULLERTON, J. (dissenting).—I dissent. There was corroborating evidence. Its weight, and the credibility of the prosecuting witness, were for the jury, and this court but usurps the jury's function when it assumes for itself the right to pass upon them.

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Opinion Per CHADWICK, J.

[No. 9604. Department Two. January 8, 1912.]

A. B. CAMPBELL, *Respondent*, v. WINSLOW LUMBER
COMPANY, *Appellant*.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—COMPLIANCE WITH COMMAND. Where a servant was told not to use a ladder until it was made secure, and it was nailed, and later moved by the foreman and replaced without making it secure, the servant does not assume the risk and is not guilty of contributory negligence, as a matter of law, in obeying an order to go down the ladder, as he had the right to assume that it had been made secure.

APPEAL AND ERROR—REVIEW—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED. It is not prejudicial error to exclude the evidence of a physician as to the conditions of a fracture at the time of the injury, where he made a physical examination just before the trial and testified as to its condition at that time, and the excluded evidence would have added nothing material.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered January 7, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by a carpenter in the fall of a ladder. Affirmed.

Jessup & Grinstead, for appellant.

Danson & Williams, *H. A. Rochford*, and *A. E. Barnes*, for respondent.

CHADWICK, J.—Plaintiff is a carpenter, and at the time of the injury complained of was employed by the defendant in assisting in the work of putting its mill in a state of repair. A part of the work was the institution of some new live rolls, and in order to work from below, a ladder had been placed, leading from the lower floor up to and under the frame upon which the live rolls were placed. Plaintiff was working under the direction of a foreman who had, according to the testimony of the plaintiff, told him, at the time

¹Reported in 119 Pac. 832.

the ladder was originally placed and when he was about to use it, that it was dangerous, and that he should not use it until it had been nailed to the floor. This was accordingly done at the time. It may be stated in passing that the weather was very cold, and the lower floor of the mill was damp and covered with frost. The ladder remained in this position and in use for about two weeks, when it was removed by the foreman to another part of the mill. It was thereafter brought back and placed at or near the place it had formerly occupied. Occasion requiring, plaintiff was directed to go to the lower floor for some material. He says he had started for the stairway when the foreman called him and directed him to go down the ladder, it being closer at hand; that he attempted to do so, when the ladder, the bottom of which he could not see, slipped, throwing him to the floor beneath and fracturing his leg. From a judgment in favor of the plaintiff, the defendant has appealed.

It is contended that respondent cannot recover because, the ladder being an instrument of such simple construction, any danger attending its use would be as well within the knowledge of the respondent as of the appellant; that no legal liability would be imposed upon appellant to warn or protect respondent, within that line of cases which we have just followed in *Cole v. Spokane Gas and Fuel Co.*, ante p. 393, 119 Pac. 831. This might be held, if the accident had resulted from some defect in the ladder itself. But the testimony takes this case out of that rule. The evidence shows that respondent had been told by the foreman not to use the ladder unless it was made secure. Appellant's foreman nailed the ladder in its first position; so that, when it had been moved and replaced, respondent had a right to assume that it had been made secure in its changed position. These facts carry the case within the rule of *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900, where the text of *Labatt, Master & Servant*, § 439, was adopted.

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We shall not take space to repeat more than the last part of the quotation there employed:

"In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from an obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order."

We think that the questions of contributory negligence and assumption of risk were for the jury.

Two physicians attended respondent after he was injured. He called one of them as a witness. The physician testified as to the character of the injury, and offered an opinion as to its permanency. Among other things, he said that, aside from the fracture, there was a severe laceration of the ligaments. Appellant called the other physician and sought to show by him that there was no laceration of the tendons; that the injury was what is known as a Pott's fracture from which permanent injuries are less likely to occur than if complicated by lacerated tendons. It is contended that respondent, by putting one physician on the stand, waived his privilege to object to the other being heard. We do not find it necessary to pass upon this disputed question in the law; for, granting that the testimony was improperly excluded, we think no prejudice sufficient to warrant a new trial could have occurred. The physician whose testimony was rejected had examined respondent the day before, and was allowed to testify fully as to the then condition of respondent's ankle. He found it to be in "fair condition." "It has a little ankylosis; a little stiff; otherwise he has got a good ankle." He found no swelling or enlargement. He also testified that a Pott's fracture would necessarily cause a stiffening (ankylosis), and that use of the limb soon after the fracture would tend to increase that condition. This testimony fairly negatives the testimony and opinion of the first physician, for we may assume that, if

there had been any evidence of lacerated tendons, it would have been evident at the time the examination was made. The fact that, in the judgment of the second physician, the defendant had a good ankle save a slight stiffness, is in its resultant force all that appellant could have shown had the doctor been examined as to the appearance of the member immediately after the injury.

Finding no reversible error, the judgment is affirmed.

Crow and ELLIS, JJ., concur.

DUNBAR, C. J. (concurring).—While I have no fault to find with the doctrine announced by Judge Chadwick, I think it conclusively appears for another reason that the action of the court in regard to the rejection of testimony was without prejudice. It is not contended by the appellant that the verdict was excessive. In fact, it was candidly announced by the attorney for the appellant in his argument that no question was raised as to the excessiveness of the verdict. That being true, the testimony offered was entirely without materiality, and therefore its rejection was without prejudice.

I therefore concur in the result.

[No. 9836. Department Two. January 8, 1912.]

NORWEGIAN DANISH METHODIST EPISCOPAL CHURCH OF
SPOKANE FALLS, *Respondent*, v. HOME TELEPHONE
COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATION—AGENCY—INDEPENDENT CONTRACTORS—EVIDENCE—SUFFICIENCY. A *prima facie* case of agency is shown, and the burden of proof is upon defendant to show that the work was done by an independent contractor, where it appears that plaintiff's property was injured by blasting prosecuted in aid of defendant's enterprise by another telephone company, as claimed by a witness who knew nothing of the contract, that the two companies had a common president, and that he was directing the work, and the alleged contracting company was doing no work other than construction work for the defendant company.

SAME. Where blasting in a city street is done by virtue of defendant's franchise, an independent contractor doing the work may also be the agent of the defendant, rendering defendant liable for the negligence of the contractor on the principle of *respondet superior*.

TRIAL—JOINT LIABILITY—VERDICT EXONERATING CODEFENDANT. In an action for damages to property by blasting, a verdict exonerating a codefendant does not relieve the other defendants, where it appears that such codefendant, a contractor, had nothing to do with the work, but simply loaned men to the other defendants to take charge of the blasting.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 31, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to property from blasting. Affirmed.

John F. Davies and *L. B. Cornell*, for appellant.

Severin Iverson, for respondent.

CHADWICK, J.—This action was brought by the respondent to recover damages. It seems that it was necessary to blast out a ditch or conduit in one of the streets of the city

¹Reported in 119 Pac. 834.

of Spokane, and adjacent to the property owned by respondent, in which to put the wires and conduits belonging to appellant's telephone system. The complaint alleges that the damages resulted because of the careless and negligent manner in which the work was done by appellant, its agents, and servants. Appellant's answer is a general denial. At the trial, respondent showed the character and extent of its damage, and there was some testimony from which the jury might find negligence. In submitting its case, respondent called as a witness one of the men under whose actual direction the work was done. He testified that the work was in charge of, and carried on by, the "Interstate Consolidated Telephone Company;" that "they [the Consolidated Company] have a contract. What their contract is, I don't know. That is out of my jurisdiction. I am simply employed on the construction work." He said, also, that the Home Telephone Company had nothing to do with the work, and further:

"Q. Who employed you? A. C. S. Lane. Q. And who is he? A. He is president of the Interstate Consolidated Telephone Company. Q. And isn't he the president of the Home Telephone Company too? A. He is."

It is contended that the evidence shows the work to have been done by an independent contractor, and that no recovery can therefore be had against appellant. We think, however, that, when it was shown that the work was done in aid of a general scheme prosecuted in aid of appellant's enterprise, that the alleged independent contractor and appellant had a common president, that he was directing the work, and that the alleged contractor was engaged in no work other than construction work for the Home Telephone Company, a *prima facie* case was made out. *Dillon v. Hunt*, 82 Mo. 150; *Redstrake v. Swayze*, 52 N. J. L. 129, 18 Atl. 697. These facts are quite as consistent with the theory of agency as that of independent contractor, and the burden

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shifts to appellant to show its true relation to the construction company, the best evidence of which would have been its contract; thus making a mixed question of law and fact, or one of law alone. This it did not do, but left the question one of fact only, contenting itself to rest upon the case as made by respondent.

"*Prima facie*, the person at whose instance and for whose use and benefit work is done is liable for all injuries to third persons resulting from the negligence or unskilfulness of those executing the work; that, unless some evidence is given as to the terms of the contract, 'it is no more proper to assume that it gave the contractor an independent employment than that it stipulated for the work to be done under the immediate supervision and direction of the defendant;' if the defense is that the wrongdoer was not a servant the contract must be shown 'with sufficient particularity to enable the court to determine whether the employment was of this independent character.' *McCamus v. Citizens etc. Co.* (1863), 40 Barb. (N. Y.) 380."

See *Moll, Independent Contractors etc.*, § 32; note to *Richmond v. Sitterding*, 65 L. R. A. 459, citing *Welfare v. London Railroad* (1869) L. R., 4 Q. B. 693.

Although the instructions of the court are not made a part of the record, we confidently assume that the issue as we have stated it was submitted to the jury by proper instructions, so that its verdict is conclusive. While ordinarily the existence of the relation of contractor, if proven, excludes that of principal and agent or master and servant, it is not always so. The relations of contractor and agent are not necessarily repugnant. Assuming, for the sake of argument, that the relation of independent contractor was shown, it does not follow, considering the facts of the instant case, that appellant might not be liable under the doctrine of *respondent superior*. The appellant was prosecuting its work under a franchise given by the city, and its contractor would in law act, not only for itself, but of necessity as an agent for appellant. This distinction is noticed

in *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78, where it is said:

"The difference between them [independent contractor and agent] is, that a contractor acts in his own right and for himself, whereas an agent or servant acts for and in the name of another. In the case before us, both relations exist and must necessarily exist from the peculiar character and circumstances of the case. The contractors not only acted for themselves, but at the same time as agents for the city, under the power given it to construct sewers in its streets, which are public highways. They had no right to make the excavation they did, except as agents for the city; and had they been proceeded against by indictment for creating a public nuisance, they could not have justified in their own right, but would have had to justify as agents of the city under their contract. . . . The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding—for such are the requirements of the law in the execution of the power—that it shall be so executed as not unnecessarily to interfere with the rights of the public, and that all needful and proper measures will be taken, in the execution of it, to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations; he can not accept the power divested of them, or rid himself of their performance by executing it through a third person, as his agent. He may stipulate with the contractor for their performance, as was done by the city, in the present case, but he can not thereby relieve himself of his personal liability; or compel an injured party to look to his agent instead of himself for damages."

Appellant has briefed and vehemently urged the proposition that the work of blasting is not of such inherent danger as to prevent the principal from exonerating himself by giving the work over to an independent contractor. Inasmuch as this argument is predicated upon the theory that the work was done by an independent contractor, when, as we have shown, the verdict of the jury is sustained in law, this contention will need no discussion.

Finally, it is insisted that, whereas one Fife, who was made

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a codefendant, was exonerated by the jury, it follows that no verdict can stand against appellant. This argument is based upon the assertion that, inasmuch as Fife actually did the work, if he was not careless or negligent, there could be no charge of omission against the principal. The record shows, without contradiction as we read it, that Fife bore no relation whatever to either the appellant or the construction company. He was engaged in street work in the city of Spokane. When it became necessary to do the blasting complained of, he loaned two of his men to Mr. Sawhill who had immediate charge of the work, merely as a matter of accommodation, it appearing that Fife had previously done some work for appellant and that their relations were amicable to a degree warranting the asking and granting of favors between them.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 10050. Department Two. January 9, 1912.]

HEWITT LEA LUMBER COMPANY, *Respondent*, v.

F. F. SANDELL *et al.*, *Appellants*.¹

MECHANICS' LIENS—NOTICE TO OWNER—DUPLICATE STATEMENTS—SUBSEQUENT MORTGAGES—PRIORITY. Under Rem. & Bal. Code, § 1133, requiring duplicate statements to be furnished to the owner at the time material is delivered, notice must be given to the one who was known to hold the legal title to the lots, of lumber delivered to one in possession under a lease with an option to buy, notwithstanding that subsequently the owner gave a deed to the lessee and took back a mortgage, and that Rem. & Bal. Code, § 1132, makes a mechanics' lien superior to mortgages subsequent to the commencement of the furnishing of the materials.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 25, 1911, upon findings

¹Reported in 119 Pac. 848.

in favor of the plaintiff, in an action to foreclose a mechanics' lien. Reversed.

Peters & Powell, for appellants.

Alexander & Bundy, for respondent.

CHADWICK, J.—On April 7, 1910, appellants Sandell and one Holden executed a contract covering certain lots in the city of Seattle. The terms of the contract material to our present inquiry are as follows:

"I have this day leased to D. N. Holden for a term of five years from this date the northeast corner of Park Ave. and Navy Yard Ave., technically described as the east twenty feet of lots seventeen block sixteen, East Seattle, King County, Washington, rent to be paid every six months; said rental is twenty-five dollars per year from date, and I further agree to sell to said D. N. Holden, at any time within sixty days from date for the sum of three thousand dollars the east one-half of lots sixteen and seventeen and allow all money paid for the above lease to apply on purchase price of said one-half of lots sixteen and seventeen, twelve dollars and fifty cents of which I have this day received."

Holden went into possession and began the erection of a building. Appellant F. F. Sandell protested this act in writing. On April 29 the parties came together, and it was agreed that Holden would provide for the payment to appellants of a certain insurance premium, then in process of collection, in which event a deed was to be executed and a mortgage given for the balance due. This occurred about April 30. On May 31, Holden paid \$800, and appellants executed a deed, taking a mortgage to cover the balance of the purchase price, which was made payable in one, two, and three years. On April 30, respondent, the Hewitt Lea Lumber Company, began to furnish material for the building which Holden was erecting, and continued to do so from time to time up to May 21. It is conceded by respondent that it knew, at the time it furnished the material to Holden,

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that he had not obtained a deed for the property, and that Holden had only a contract for the purchase thereof; but it contends that, when appellants saw fit to change the form of their security, releasing the contract and taking a mortgage, they must depend entirely upon the mortgage, basing its contention upon Rem. & Bal. Code, § 1132, wherein it is provided that the liens created under the mechanics' lien statute are preferred to any lien, mortgage, or other incumbrance which may attach subsequently to the time of the commencement of the performance of the labor or the furnishing of materials for which a right of lien is given. While it is conceded that appellants had notice of the nature of Holden's title, we will nevertheless take the liberty of quoting a part of the testimony of the sales agent of respondent, in order to make our conclusion plainer than it otherwise might be. It follows:

"Q. Do you know, Mr. Payton, who the reputed owner of that property was on or about April 30, 1910? A. Well, it was understood that the deed was in Mr. Sandell's name, but Mr. Holden had a contract on it to buy it. Q. Did you have any conversation with Mr. Holden at the time you sold the first bill of lumber, in regard to who owned this property, in regard to the title of the property? A. Yes, sir. Q. What did Mr. Holden state? A. He showed me a contract that he had, and said that he would take it up at a certain time, and he told me he was going to when he got this insurance money."

We are of the opinion that the amendment to the lien law, Laws 1909, page 71, § 1, Rem. & Bal. Code, § 1133, is decisive of this case. The law is that a notice shall be given to the owner or reputed owner (in this case the owner was known), by delivering or mailing to him a duplicate statement of the materials furnished, and that no materialman's lien shall be "filed or enforced" unless the provisions of the law be complied with. No notice was given in this case. The law being in terms mandatory, we have given it literal construction. In *Finlay v. Tagholm*, 60 Wash. 539, 111

Pac. 782, we said that the purpose of the law was not so much to insure a right of lien, as to protect property owners against dishonest contractors. We were asked to give the law a liberal construction in *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083, but met the contention squarely, saying that, "there is no primary obligation on the respondents. In order for the appellant to get the lien of the statute, it must comply with its terms. . . . The legislature has made no exception for cases where the owners of the property have knowledge that the material is being furnished." In *Heim v. Elliott*, ante p. 361, 119 Pac. 826, our previous interpretations of the statute are reaffirmed.

We have sought by reference to equitable principles to find some way in which respondent can recover the amount of its bill, but having failed to comply with the statute, it has no lien and hence no standing of which equity can take notice. The words of the statute that, unless duplicate statements be sent to the owner, no lien shall be filed or enforced, marks the bounds of our rights to interfere. Having no right to file a lien, it does not follow that, because appellants changed the form of their security, life and validity can be given to that which the statute has said shall be as nothing. The legislative policy is clearly expressed in the statute, and to construe it to meet the equities of the present case would be to emasculate the law and to make the right to file and enforce liens dependent upon the conscience of the chancellor, rather than upon the written expressions of the legislative will.

Judgment reversed, with instructions to enter a judgment in favor of the appellant.

MORRIS, ELLIS, and CROW, JJ., concur.

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Opinion Per ELLIS, J.

[No. 9868. Department Two. January 10, 1912.]

ANNA PETERSON, *Appellant*, v. J. W. WHEELER,
Respondent.¹

JUDGMENT—ACTION TO VACATE—NECESSARY PARTIES—DEFENDANTS—PURCHASERS. Where property was attached and sold under a judgment alleged to be fraudulent and void, the purchasers at the sale are indispensable parties to an equitable action to set aside and vacate the judgment.

JUDGMENT—RES JUDICATA—PARTIES AND PRIVIES. In an action by grantees acting merely as trustees of judgment debtors, brought against the purchasers of the property at execution sale to set aside the judgment and sale as fraudulent and void, a judgment quieting the title of the purchasers is *res judicata* as far as the title to the property is concerned, and bars a subsequent action by the judgment debtors against the judgment creditors to set aside the judgment, which was satisfied by the execution sale.

APPEAL—REVIEW—PLEADINGS—AMENDMENTS. In an equity case, a defective plea of *res judicata* will be deemed amended on appeal to conform to proof.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 10, 1911, dismissing an action to vacate a judgment, after a trial on the merits before the court. Affirmed.

H. E. Foster, for appellant.

Byers & Byers, for respondent.

ELLIS, J.—This action was commenced in November, 1909, by appellant as plaintiff against respondent as defendant, to vacate a judgment entered in the superior court for King county on April 24, 1901, in an action by respondent as plaintiff against the appellant as defendant, being cause number 31,502, of the records of the superior court for King county.

The complaint is voluminous, but in effect alleges that,

¹Reported in 120 Pac. 83.

on or about February 21, 1901, the appellant was, and has ever since been, a resident of Moline, county of Rock Island, state of Illinois; that the respondent, for the purpose of defrauding the appellant, commenced an action against appellant and her husband (cause number 31,502), and wrongfully filed therein a false and fraudulent affidavit and had issued thereon a writ of attachment; that the complaint in that action was false, fraudulent, and insufficient to sustain any judgment; that service was made upon the appellant by publication of summons, based upon an affidavit of nonresidence, which was false, fraudulent and insufficient to give the court jurisdiction, and that the action was wrongfully prosecuted and a judgment wrongfully procured against appellant. Copies of the complaint, affidavit for attachment, affidavit for publication of summons, and judgment are attached to the complaint and made parts thereof. The complaint prays that the judgment be declared void, and that the respondent and all persons claiming through him be enjoined from claiming under the judgment. The complaint makes no reference to any sale of the property attached.

The answer denies the allegations of the complaint, except that the suit was commenced, prosecuted to judgment, and property of appellant attached and sold. The answer also sets up four affirmative defenses: (1) That, at the time the original action was brought, the appellant here was the wife of one John Peterson, and that he is not a party to this action; (2) that this action was not brought within the time limited by law; (3) that the judgment in cause number 31,502 was, on June 1, 1901, fully satisfied and that there is now no judgment of record in that action against the appellant or her husband; and (4),

"That on or about November 22, 1907, the said plaintiff parted with all her right, title, claim and interest in and to the said property and every part thereof, and that thereafter and on or about January 29, 1908, her successor in interest in said property, C. S. Wangelin and wife, brought suit in

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the superior court of King county, state of Washington, against A. Soutar and others, which suit is cause No. 59,699 of the causes of this court. That thereafter such proceedings were had that the defendants in said action duly appeared and a trial was had, and the superior court of King county, Washington, adjudged and decreed that all the proceedings in cause No. 31,502, being the action brought by this defendant against the plaintiff and her said husband here, be declared legal, valid and binding, and that, by reason of the fact that the plaintiff in this action has parted with all her right, title, and interest in said land, the decree of this court in cause No. 59,699 is binding on the above named plaintiff."

A demurrer was interposed to each of these affirmative defenses, but the transcript fails to show that this demurrer was ever in any manner passed upon by the court. In the briefs, however, it seems to be admitted that it was heard by Honorable Mitchell Gilliam, one of the judges of the superior court for King county, and sustained as to all except the third affirmative defense, as to which it was overruled. The reply denies the allegations of the third affirmative defense, and sets up affirmatively a levy of the attachment upon, and a sale of, a certain described five acres of land, in King county, under color of judicial process pursuant to the judgment in cause number 31,502, which is again alleged to have been fraudulently obtained. The trial was had before Honorable Wilson R. Gay, another judge of the superior court for King county, and judgment rendered in favor of respondent and against the appellant, dismissing the action. Thereupon this appeal was taken.

The judgment roll in cause number 31,502 was introduced in evidence. It shows that, in that suit, an attachment was levied upon the five acres of land described in the appellant's reply, which it is conceded then belonged to the appellant, and that this land was, on June 1, 1901, sold to one Anna P. Soutar, by the sheriff of King county, under the attachment in full satisfaction of the judgment. The sale was confirmed on June 2, 1902.

A court of equity will look straight to the ultimate effect of a bill, rather than to its naked allegations. The manifest purpose of the action before us was to attack this sale by vacating the judgment upon which it was based. The purchaser at that sale and those claiming under her are now the real adverse parties in interest. They are necessary parties to any valid decree in this action. It would be an idle thing to render a decree vacating the judgment which has been satisfied by the sale. Such a decree would have no binding force or effect, as against the purchaser under that judgment, or those claiming under her. This is a proceeding in equity, and before their title will be clouded by any decree, they are entitled to a hearing. They may have a complete defense in the seven-year statute of limitations, laches, other matter of estoppel, or some other defense, which might not be available to the original judgment creditor. A court of equity will never proceed to a determination of issues when it becomes apparent that the rights of persons not parties to the suit are necessarily involved. Such parties must either be brought in or the action will be dismissed.

In the case before us, it became manifest, from admissions of counsel for appellant and from the evidence, that, if the purchaser at the attachment sale had been made a party, the suit could not be maintained. The judge before whom the cause was tried evidently entertained grave doubt as to the correctness of the prior ruling sustaining the demurrer to the fourth affirmative defense above quoted. He admitted evidence in support of that defense. The evidence showed that the appellant, in January, 1907, conveyed the five acres of land in question to one Harry McCaskren. There was evidence tending to show that McCaskren was then attorney for appellant. It was admitted by counsel for appellant, at the time this deed was offered in evidence, that McCaskren held the title only in trust. Though not in evidence, it was, also, at that time stated by counsel for appellant that McCaskren deeded the land to one Charles S.

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Wangelin, and at the same time appellant introduced in evidence a deed dated January 31, 1910, from Wangelin and wife conveying the property back to the appellant.

The respondent also introduced in evidence findings of fact, conclusions of law and a decree in a suit to recover possession of the land brought by Wangelin and wife, in the superior court of King county (cause number 59,699), against Andrew Soutar, grantee of Anna P. Soutar, the purchaser under the judgment here attacked, and one A. M. Lee, who held a contract to purchase the land from Andrew Soutar. These findings were made in September, 1908, and sustained the right of Soutar and Lee to the land and found the sale in the original attachment suit brought by the respondent against the appellant and her husband a valid sale. The decree quieted the title in Soutar and Lee. The evidence and admissions of counsel in the case before us make it plain that McCaskren and Wangelin were acting merely as trustees for the appellant, and that the suit of Wangelin v. Soutar and Lee was actually brought in the interest of the appellant here. The decree in that case is, therefore, *res adjudicata*, so far as the title to the land is concerned. If *res adjudicata* was not sufficiently pleaded in the fourth affirmative defense, it was at all events sufficiently proved. This being a trial *de novo*, the pleading will be deemed amended to conform to the proof. On the whole record, we are satisfied that the court committed no error in dismissing the action.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9830. Department One. January 10, 1912.]

WESTERN LUMBER & POLE COMPANY, *Appellant*, v.

A. B. JOSLYN *et al.*, *Respondents*.¹

PARTNERSHIP—DISSOLUTION—RETIREMENT AND RELEASE OF PARTNER—EVIDENCE—SUFFICIENCY. Where partners had contracted in writing for the cutting of timber owned by them, a release of one of the partners is not shown by evidence that some months later he sold his interest in the subject-matter to his copartner, gave notice thereof and that the partnership was dissolved, and that the other party to the contract continued the work, looking for his pay to the other partner, against whom he carried the account on his books, where it appears that the account happened to be so carried because payments of checks were made by such partner, and where no release was given or talked about.

ESTOPPEL—MISTAKE—PREJUDICE. Upon an issue as to the release of one partner from liability on a partnership contract, the fact that both parties to the contract took it for granted that the withdrawal and assignment of one partner *ipso facto* worked a release, does not amount to a release by way of estoppel, where the performance of the contract was continued the same as before and nothing was done to mislead the retiring partner to his disadvantage.

Appeal from a judgment of the superior court for Spokane county, Holcomb, J., entered February 25, 1911, upon findings in favor of the defendants, in an action upon account. Reversed.

Davis & Rhodes, for appellant.

Nuzum & Nuzum and *Geo. H. Armitage*, for respondent Joslyn.

GOSE, J.—This is a suit to recover a balance due upon an assigned account. From a judgment in favor of the defendant Joslyn, the plaintiff has appealed.

The facts are that, on June 30, 1906, the appellant's assignor, one J. C. English, entered into a written contract with the respondents Joslyn and Kinney, whereby he

¹Reported in 120 Pac. 69.

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agreed to cut, haul, and deliver, in cars on the Kootenai Valley railroad, on or before July 1, 1907, "all the cedar poles and piles" on the land specifically described in the contract, at the prices therein fixed; that the respondent Joslyn signed the contract on behalf of the respondents as "Joslyn & Kinney;" that English performed the contract on his part; that there is a balance due thereon amounting to \$1,175.88; that the respondents, at the time the contract was executed, were the owners of the timber which was the subject of the contract, and that on November 22, 1906, the respondent Joslyn sold his interest in the timber to his correspondent, and advised English of that fact. It further appears that English carried the account in his books against Kinney only; that he made no demand upon Joslyn for payment until about the time the action was commenced, and that he testified that he always looked to Kinney for payment.

The court found that, at the time of the sale of Joslyn's interest in the subject-matter of the contract to Kinney, the partnership existing between Joslyn and Kinney was dissolved, and that English thereafter "continued to work for said Kinney, looking to said Kinney alone for pay, and understanding that he, the said English, was to look to said W. R. Kinney for his pay, and not to A. B. Joslyn." The court further found that there was nothing due to English at the time of the assignment from Joslyn to Kinney. The conclusion of law deduced from the facts found is that there is no liability upon the part of respondent Joslyn.

We do not think the evidence warrants the finding or conclusion that Joslyn was released from liability. It is not contended that there was any express release of Joslyn. Joslyn's testimony upon that subject is as follows:

"Q. But Mr. English never gave you any release from this obligation on your contract? A. I don't think Mr. English ever understood that he had any contract with me. Q. I am asking you if he ever gave you any written release?

A. No, sir. Q. Did you ever talk with him about any release? A. I did not, because I didn't consider I was a partner of Kinney in any way whatever. Q. So you and English never talked about any release of your obligations on that contract that you had signed with him? A. No, sir. Q. And you say, Mr. Joslyn, that you never had any talk with Mr. Kinney asking him to conduct the business in the year 1906, the business of Joslyn and Kinney, in his own name? A. No, sir. . . . Q. How did you happen to talk to Mr. English and tell him that you had sold out? A. Well, I presume the same as any one else would tell that they had sold out; not for any particular reason. The same as I told Mr. French or any other man."

The only evidence tending to show a release of Joslyn is, (1) that the account was carried in the books against Kinney only, and (2) that English testified that he looked to Kinney for his pay. The first circumstance has little weight, because the contract was carried against Kinney only, both before and after Joslyn sold his interest to Kinney. English explains why he carried the account in this way, as follows: "All of the checks that were issued to me were issued by W. R. Kinney. Therefore, I just made the account W. R. Kinney." Nor does the testimony of English that he looked to Kinney for his pay show a release of Joslyn.

Counsel for the respondent Joslyn thus state their position: "Abandonment of a contract need not be by formal release or cancellation, but may be shown by conduct of the parties." It is true that a waiver, a rescission, or an abandonment of a contract may be shown either by direct or circumstantial evidence, or by both, and it is likewise true that a party may by his conduct estop himself from asserting a right arising from contract, whether written or oral. The evidence, however, does not show that the appellant's assignor lost his right to enforce payment against Joslyn by any of these methods. Joslyn seems to have assumed that the sale of his interest in the subject-matter of the contract *ipso facto*

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absolved him from liability to English. It may also be inferred from the evidence that English entertained the same view. This, however, was an erroneous deduction. It is elementary that, when there is no element of estoppel, it requires a meeting of minds to make or to terminate a contract. After the assignment from Joslyn to Kinney, English continued in the performance of the contract just as he had done before the assignment. He did nothing and he said nothing thereafter which could have misled Joslyn to his prejudice. The mere fact that he may have entertained a wrong view of the law does not release Joslyn, or estop English or his assignee from claiming recompense under the terms of the written contract. These views are supported by the following authorities: *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108; *Holden v. McFaul*, 21 Mo. 215; *Dean v. McFaul*, 23 Mo. 76.

The judgment is reversed, with directions to enter a judgment against the respondent for \$1,175.88, with legal interest from the time of the completion of the contract.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9843. Department One. January 10, 1912.]

CHARLES T. ROBINSON *et al.*, *Appellants*, v. THE CITY OF SPOKANE, *Respondent*.¹

MUNICIPAL CORPORATIONS—STREETS — ABUTTING OWNERS — SHADE TREES. In improving a street, the city may revoke a license theretofore granted to abutting owners to plant shade trees in the street, and may destroy trees planted without liability therefor, where the action is not wanton or unreasonable.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 9, 1910, dismissing an action in tort, after a trial on the merits before the court without a jury. Affirmed.

¹Unreported in 120 Pac. 101.

Walter B. Mitchell, for appellants, contended, among other things, that the maintenance of shade trees in a street is a proper use of the street. *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 106 Am. St. 549, 70 L. R. A. 761; *Frostburg v. Wineland*, 98 Md. 239, 56 Atl. 811, 103 Am. St. 399, 64 L. R. A. 627; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 93 Pac. 423, 125 Am. St. 927, 17 L. R. A. (N. S.) 1005; *Lund v. Idaho & Washington N. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916. The city could not arbitrarily deprive owners of their rights. *Seattle v. Columbia & Puget Sound R. Co.*, 6 Wash. 379, 33 Pac. 1048; *In re Frazee*, 63 Mich. 396, 30 N. W. 72, 6 Am. St. 310; *City of Grand Rapids v. Newton*, 111 Mich. 48, 69 N. W. 84, 66 Am. St. 387, 35 L. R. A. 226; *State ex rel. Burrows v. Superior Court*, *supra*. The determination to remove shade trees must be upon a fair and reasonable consideration, and if arbitrary or unreasonable, will be enjoined. *Frostburg v. Wineland*, *supra*; *Paola v. Wentz*, 79 Kan. 148, 98 Pac. 775, 131 Am. St. 290; *Kemp v. Des Moines*, 125 Iowa 640, 101 N. W. 474; *Crismon v. Deck*, 84 Iowa 344, 51 N. W. 55; *Stretch v. Village of Cassopolis*, 125 Mich. 167, 84 N. W. 51, 84 Am. St. 567, 51 L. R. A. 345.

A. M. Craven and *V. T. Tustin*, for respondent.

MOUNT, J.—The plaintiffs brought this action to recover damages from the defendant on account of the alleged wrongful destruction of certain shade trees, in the street in front of their property. The city denied liability, and alleged that it had regularly undertaken to improve the public street, and that, in order to conform to the plans and specifications adopted by the city in its legislative capacity, it became necessary to remove the trees, and the same had been done
, *acto*

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by order of the board of public works. The case was tried to the court without a jury. At the close of the defendant's evidence, the court dismissed the action. Plaintiffs have appealed.

It appears that the city had by ordinance permitted the use of the street in question, and other streets, for the purpose of planting shade trees thereon. The grantors of the plaintiffs had availed themselves of this privilege, and had planted the trees in question in front of their property. After plaintiffs acquired the property, they cared for the trees, which grew to be large shade trees. These trees stood in the street about ten feet from the property line. The street was an unimproved street. In the year 1909, the city passed an ordinance directing the improvement of the street according to certain plans and specifications. When the improvements were being made, it was found that the trees stood within the sidewalk area, and they were destroyed by order of the board of public works.

Appellants' position seems to be that they have a property right in the trees by reason of their ownership of the abutting property, and that the city may not destroy the trees unless they constitute a nuisance in the street. It is no doubt true, as argued by the appellants, that the owner of property abutting upon the street has a property right to light, air, and access to his property from the street, but it does not follow that such owner has the right to maintain shade trees or any other permanent obstruction in the street. The statute declares that all streets shall be highways, and under the control of the corporate authorities of the respective cities. Rem. & Bal. Code, § 7837. Among the powers granted to cities of the first class, is the power to open, alter, widen, grade, and otherwise improve streets, "and to regulate and control the use thereof and to vacate the same." Rem. & Bal. Code, § 7507. The charter of the city of Spokane provides:

"The city of Spokane shall have the sole and exclusive

control of all streets, highways, alleys and grounds within its limits dedicated to the public use. The fee of all property dedicated to the public use shall vest in the city of Spokane." Spokane Charter, § 75.

It seems clear, therefore, that whatever right the city may have heretofore granted to abutting owners to plant trees in the street, such right was a mere permissive right or license which might be revoked at any time, and no vested rights could arise therefrom. The city in its legislative capacity might exercise this power to revoke the license and cause the removal of any obstruction in the street without liability. In the note to *Rosenthal v. Goldsboro*, 149 N. C. 128, 62 S. E. 905, 20 L. R. A. (N. S.) 809, reported in 16 Am. & Eng. Ann. Cases, at page 642, it is said:

"The recent decisions are practically unanimous in holding that where, in undertaking a public improvement or for the purpose of abating a nuisance, it becomes necessary to remove shade trees from a city's streets or sidewalks, the municipal authorities are vested with the power to direct the removal of such trees, notwithstanding the objection of an abutting owner whose interests may suffer thereby. *Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311; *Hildrup v. Windfall City*, 29 Ind. App. 594, 64 N. E. 942; *Gallaher v. Jefferson*, 125 Ia. 324, 101 N. W. 124; *Kemp v. Des Moines*, 125 Ia. 644, 101 N. W. 474; *Landry v. Lake Charles*, (La.) 51 So. 120; *Colston v. St. Joseph*, 106 Mo. App. 714, 80 S. W. 500; *Morris v. Salt Lake City* (Utah), 101 Pac. 373. See also *Gamble v. Pettijohn*, 116 Mo. 375, 22 S. W. 783. Where it appears that the city's action is not wanton or unreasonable, and that the trees stand in the way of the completed improvement or interfere with the use of the street, the abutting owner cannot prevent their removal."

We think this is the correct rule. In this case it is conceded that the city was undertaking a public improvement, and that the trees were within the sidewalk area, and there is no showing that the action of the city was wanton or un-

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reasonable. The plaintiffs were therefore not entitled to recover.

The judgment is affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9840. Department One. January 10, 1912.]

J. G. GIBSON, *Appellant*, v. M. FEENEY, *Respondent*.¹

PLEADING—ANSWER—INCONSISTENT DEFENSES. A general denial of the execution of a note is not inconsistent with an affirmative defense alleging the securing of defendant's signature by fraud while intoxicated, and want of consideration.

BILLS AND NOTES—ACTIONS—ANSWER—FRAUD—SUFFICIENCY. An answer states a good defense to an action upon promissory notes, where it alleges that the defendant's signature was procured by fraud while he was so intoxicated that he did not know what he was doing and that the consideration for which the notes were given never passed.

APPEAL—REVIEW—HARMLESS ERROR. In an action upon a note, error in ruling upon a cross-complaint relating to a second note not yet matured, is harmless where the issues thereon were tried out upon a supplemental complaint and answer after maturity of the second note.

BILLS AND NOTES—DEFENSES—FRAUD—ESTOPPEL TO ASSERT DEFENSE. Failure to promptly deny liability on notes, procured by fraud while intoxicated, does not estop the defendant from asserting his defense, where he then claimed that he had no recollection of signing the notes.

Appeal by plaintiff from a judgment of the superior court for Douglas county, Steiner, J., entered December 8, 1910, upon the verdict of a jury rendered in favor of one of the defendants, in an action on a promissory note. Affirmed.

W. A. Reneau and G. G. Hannan, for appellant.

Canton & Hensel, for respondent.

¹Reported in 120 Pac. 97.

PARKER, J.—This action was originally commenced by the plaintiff on January 4, 1910, to recover from the defendants the sum of \$1,150, together with interest, upon a promissory note alleged to have been executed jointly by the defendants on October 26, 1908, payable to the plaintiff on October 26, 1909. The defendant M. Feeney answered separately, denying the execution of the note by himself, and denying generally the allegations of the complaint, except as expressly admitted in his affirmative defense, which is as follows:

“That on the 3d day of November, 1908, the said plaintiff J. G. Gibson, pretending to be the owner of a certain jackass named ‘Jack Bryan,’ approached the defendant with the proposition to sell the same to him. That this defendant then and there informed the said Gibson that he did not want to purchase this said jackass or any other jackass and that he had no use for the same.

“That thereafter on said day, the same being the general election day in the state of Washington, the said plaintiff, J. G. Gibson, confederating with two notoriously insolvent horse traders, to wit, W. O. Houston and Peter Snyder, co-defendants named in plaintiff’s complaint herein, and with intent and for the purpose of cheating and defrauding this defendant, plied this defendant with intoxicating liquors during the afternoon and evening of said day, until he became so notoriously intoxicated and stupid from drinking the said liquors as to be unable to make, comprehend or enter into any contract or deal of any kind, with any understanding of its contents, conditions, force and effect whatever.

“That the said J. G. Gibson, having as aforesaid gotten this defendant into a stupor, from plying him with liquors, and by trick and deception, and with the aforesaid purpose and design of cheating and defrauding this defendant and under the pretense of selling defendant a jackass named ‘Jack Bryan,’ secured this defendant’s signature, as defendant has learned and been informed within a few weeks prior to the commencement of plaintiff’s above entitled action, to two notes, one being the note set out in plaintiff’s complaint herein, to wit, for \$1,150 drawing 8% per cent interest and

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payable October 26th, 1909, the other being for \$1,150 drawing 8% interest and due and payable Oct. 26th, 1910.

"That the defendant never intended to sign said note, has no recollection of having signed the same, and on or about December 1st, 1909, for the first time learned that his name was signed to said note.

"That this defendant did not purchase, and has not purchased or received any jackass or other thing of value at any time, in any manner, or at all, from said plaintiff J. G. Gibson, or from anybody acting for him or in his behalf, and has received no consideration or other thing of value whatever for said note, in any manner, or at all."

He also further pleaded, as a cross-complaint, the same facts, in substance, and prayed that the plaintiff be enjoined from asserting any demand against him upon the second note which had not then matured. The plaintiff then moved the court to require the defendant Feeney to elect whether he would, in the trial of the cause, rely upon his denials or upon his affirmative defense, basing the motion upon the ground of inconsistency in these defenses. This motion being denied by the court, the plaintiff demurred to the affirmative defense, which was by the court overruled. The plaintiff also attacked the cross-complaint by motion and demurrer, both of which were overruled by the court. The plaintiff thereupon replied to the affirmative defense, and answered the cross-complaint. This all occurred before October 26, 1910, the date of the maturity of the second note. Thereafter the plaintiff filed a supplemental complaint, bringing the second note into the cause, seeking recovery thereon as well as upon the first note. Pleadings followed which made the issue thereon the same as upon the first note. A trial before the court and a jury resulted in a verdict and judgment in favor of the defendant Feeney. The rights of the plaintiff as against the other defendants are not here involved. The plaintiff has appealed.

It is first contended that respondent's denial of the execution of the notes and his affirmative defense are inconsistent,

and that the court erred in not requiring the election moved for by appellant. We are not able to agree with this contention. It is fully answered by the holding of this court in *Loveland v. Jenkins-Boys Co.*, 49 Wash. 369, 95 Pac. 490, as follows:

"Pleadings are construed according to their legal effect, and it is not a legal execution of a contract to procure the maker's signature thereto by trickery and fraud, and when a person so defrauded is sued upon the purported contract, he may properly deny its execution and plead affirmatively the fraud practiced upon him by which he was induced to apparently execute it."

See, also, *Yakima Valley Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. 823, 1 L. R. A. (N. S.) 1075; *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177. In the last cited case the question of inconsistent defenses was critically examined; and while in that case the defenses were held to be inconsistent, the discussion of the question, and the authorities there cited, show that these defenses are not inconsistent. They do not assert contradictory facts. Respondent may have physically signed the notes, yet may not have executed them in a legal sense. Some reliance is placed upon *Gerber v. Gerber*, 52 Wash. 253, 100 Pac. 735, in behalf of appellant. A remark which is made in that decision may seem to be out of harmony with the *Loveland* case above quoted from; but it, in any event, was only *dictum*, and the case did not necessarily rest upon a question of inconsistent defenses. We think the prior decisions we have cited control this case, and that there was no error in denying the motion to require an election.

It is contended by counsel for appellant that the demurrer to respondent's affirmative defense should have been sustained. The argument seems to proceed upon the assumption that respondent is trying to avoid the notes, as existing written contracts, by pleading want of consideration, want of capacity to contract, and fraud, and that the sufficiency of the

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affirmative defense is to be tested as though these defenses were being relied upon in their technical sense. For instance, it is insisted that want of consideration is not well pleaded because it does not appear from the affirmative answer but that consideration did pass to the other signers of the notes, which it is argued would be a sufficient consideration to support the notes as against all the signers. It is, however, apparent that the facts pleaded affirmatively are for the purpose of showing that there never was any execution of the notes in law. These facts are not pleaded to show a right to avoid an existing contract as to which the minds of the parties had met, but to show that there never was any contractual meeting of the minds of the parties. We are not then concerned with a technical question of pleading such as counsel for appellant seems to have in mind. The facts pleaded in defense are, in substance, that appellant knowingly procured respondent's signature to these notes when he was unable to comprehend what he was doing, and also that no consideration whatever passed to respondent therefor; that is, that he never received any of the property for which it is claimed the notes were given in payment. This last allegation simply negatives a possible estoppel which might be claimed against respondent, and is not of the essence of the defense. It also shows that rescission is not involved, since respondent received nothing which he was required to, or could, return to appellant. We think the facts pleaded constitute a good defense, and that all grounds of estoppel which might ordinarily arise against respondent upon such state of facts are negatived.

Some contention is made upon the court's rulings touching the sufficiency of respondent's cross-complaint, which was attacked by demurrer. Since the cross-complaint related wholly to the second note and sought its cancellation before maturity, and appellant after its maturity sought by supplemental complaint to recover upon it as upon the first note, the rulings of the court upon the cross-complaint then ceased

to be of any moment in the case. At the trial nothing was involved but appellant's right to recover upon both notes, as if both had been sued upon at the commencement of the action.

It is contended that the evidence fails to support the verdict and judgment. A careful reading of the entire record convinces us that this contention cannot be sustained. There is ample evidence in the record to support the judgment, though the evidence is not free from conflict. The jury were fully warranted in believing that the facts existed substantially as alleged in the affirmative defense above quoted. The evidence pointing to the part appellant, through his agent, played in procuring the intoxication of respondent is not as certain as it might be; but that he knew of respondent's extremely intoxicated condition, and took advantage of it, as alleged, there is ample evidence to warrant the jury in believing. Some contention is made that respondent did not promptly deny liability on the notes when learning of his signature thereon. The evidence indicates that he did not see the notes until a short time prior to the commencement of this action. In his talks with an agent of appellant prior to that time, the notes were not present. While in those conversations he did not positively deny that his signature was on the notes, as claimed by the agent of appellant, he did claim to have no remembrance of signing them. He did not admit liability on them at any time. We think respondent has done all legally required of him to avoid liability, especially in view of the fact that the rights of innocent parties are not involved.

Other assignments, we think, are without merit, and we regard discussion of them unnecessary.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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[No. 9786. Department One. January 10, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.ANTONIO MORETTI, *Appellant*.¹

NEW TRIAL—MISCONDUCT OF JURY—EVIDENCE—REVIEW. The denial of a new trial for misconduct of a juror is warranted, although four witnesses testified that the juror stated that he would hang the defendant if called as a juror, where the juror and one witness contradicted their testimony, the juror claiming that the conversation related to another crime.

HOMICIDE—JUSTIFIABLE HOMICIDE—DEFENSE OF DURESS—INSTRUCTIONS—KILLING IN COMMISSION OF ROBBERY. Upon the defense that accused participated in a robbery because of duress, it is not error to instruct that, on a resulting murder, there was no question of justifiable or excusable homicide, where the accused had participated in the robbery and the victim was murdered by a confederate in committing the robbery; in view of Rem. & Bal. Code, § 2392, subd. 3, defining murder in the first degree as a killing without design to effect death by a person engaged in the commission of a robbery etc.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered April 27, 1911, upon a trial and conviction of murder in the first degree. Affirmed.

John King, for appellant.

John Truax, for respondent.

PARKER, J.—This defendant, Antonio Moretti, and three others, all Italians, were jointly charged, by information filed in the superior court for Adams county, with the crime of murder in the first degree, committed by shooting one Antonio Colucci, on December 18, 1910, near Lind, in Adams county. The defendants were all charged as principals without any distinction. Moretti was awarded a separate trial, which resulted in his conviction, as charged, upon which he was sentenced to be hanged. From this conviction and sentence, he has appealed.

¹Reported in 120 Pac. 102.

It is first contended by counsel for appellant that the trial court erred in refusing to grant a new trial upon the ground of misconduct of one of the jurors. The motion was based upon the alleged declaration of the juror, made after he had been summoned to serve for the term at which the case was to be tried, and a short time before he was called to serve as a juror in the trial of the case. The declaration alleged to have been made by the juror was, in substance, that if he were on the jury he would hang the defendants, referring to them as "dagoes." The different witnesses whose affidavits are relied upon in the appellant's behalf gave slightly different versions of the language of the alleged declaration. Thereafter the juror qualified as such, and clearly indicated by answers to questions put to him upon his *voir dire* examination, that he had no prejudice against appellant. He was thereupon sworn as a juror in the case and thereafter joined in the verdict against appellant. There were four affidavits of different persons filed in support of this motion. Three of these persons claimed to have heard the declaration made by the juror. The other, being the attorney for the appellant, stated in his affidavit, upon information and belief, that another person, naming him, heard the declaration of the juror; that he would not make an affidavit to that effect when requested to do so, but told affiant that if he was subpoenaed he would so testify. Affiant then concludes his affidavit by asking that a subpoena issue for this witness. Whether or not such subpoena was issued, and what action the court took upon this request, the record does not show. In any event, the testimony of the witness does not appear in this record. However, for argument's sake, we will assume that we have here the affidavits of four witnesses stating in substance that they all heard the alleged declaration of the juror. This will be giving the appellant all the benefits he would have if the affidavit of the fourth witness were here stating in substance the same as the other three.

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The making of any such declaration is positively denied by the affidavit of the juror, and also by the affidavit of another witness, who states that he was present and heard all of the conversation in which the declaration is claimed to have been made. The juror and this witness also state in their affidavits that the conversation in which the alleged declaration occurred had no relation whatever to these defendants; but that there was mention made there of a homicide trial which occurred some time before, and about which opinions were expressed as to the justness of the verdict therein. It is apparent that there is nothing here involved except a question of fact. We think the learned trial court was fully warranted in believing that the charge against the juror was mistakenly or wrongfully made. This case is much like that of *State v. Underwood*, 35 Wash. 558, 77 Pac. 863, and we think presents no better reasons for a reversal upon the ground of this juror's misconduct than appeared in that case. This view finds support in the following decisions: *Gilleland v. State*, 44 Tex. 356; *Smith v. State*, 5 Okl. Cr. 282, 114 Pac. 350.

It is next contended in behalf of appellant that the trial court erred in excluding from the consideration of the jury appellant's claim that he participated in the robbery, resulting in Colucci's death, because of duress. The court's ruling upon this question is contained in certain instructions to the jury stating, in substance, that there was no question in the case of justifiable or excusable homicide, within the legal definition of those terms. Appellant's claim of duress is based upon the testimony of himself and another witness to the effect that, a day or two before the killing of Colucci, one of the defendants at Spokane threatened to kill appellant if he did not go along and help to rob Colucci. Appellant's own testimony renders it plain that he did go from Spokane to Lind on Saturday night, December 17, with the other defendants for the express purpose of robbing Colucci on Sunday morning, December 18,

at a place on the track of the Northern Pacific Railway Company some distance west of Lind, where they knew he would pass while on duty as a track walker for that company; that the robbery was committed at that place as planned by appellant and the others; that one of the other defendants shot and killed Colucci while in the act of robbing him; that a considerable sum of money was then taken from the person of Colucci and very soon thereafter divided among the four, while they were fleeing from the place, appellant receiving \$55 as his share. The evidence shows that appellant did not actually do the shooting of Colucci nor assist in actually taking the money from his person, but that he laid in wait and watched for the coming of Colucci a short distance away from the others. He contends that he only assisted in the robbing of Colucci; that he was not responsible for the killing of Colucci, and therefore had a right to have the question of his duress submitted to the jury, the argument of his counsel being that duress is a defense to the crime of robbery, which is the only crime appellant participated in. This contention is rested upon Rem. & Bal. Code, § 2256, which provides:

“Whenever any crime, except murder, is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats creates a reasonable apprehension in the mind of such participator that in case of refusal he is liable to instant death or grievous bodily harm, such threats and apprehension constitute duress, which will excuse such participator from criminal prosecution.”

We are quite unable to understand how this section gives appellant any right to invoke the defense of duress in this case. He would be guilty of murder under the undisputed facts of this case even though he did not have a specific intent to kill Colucci, since he had the intent to rob Colucci, and the killing occurred by one of his confederates while in the very act of the robbery. Indeed the evidence is conclusive that the money was taken from the person of Colucci

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immediately after he had been shot. Rem. & Bal. Code, § 2392, defines murder in the first degree as follows:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either— (1) With a premeditated design to effect the death of the person killed, or of another; or (2) By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual; or (3) Without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of a robbery, rape, burglary, larceny or arson in the first degree; or (4) By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway. . . ."

It is clear that, under subdivision three of this section, it is not necessary that there should be a specific intent to kill to constitute murder when there is an intent to commit robbery and the killing occurs in the commission of such intended robbery, by the person engaged therein.

In the case of *State v. Brown*, 7 Ore. 186, the supreme court of that state held that, in such a case, the purpose to kill is incontrovertibly implied from the crime in which the person committing the homicide is engaged at the time. That appellant participated in this robbery, in the eyes of the law, is shown by his own testimony. As to that crime, he is in the same situation as if he had physically done every act constituting that robbery. It follows, that since the killing of Colucci was committed by one of appellant's confederates while in the act of committing the robbery, appellant is as much responsible for the killing as he is for the robbery. By the very terms of § 2256, above quoted, this excludes the defense of duress. It might well be argued that, even if the duress mentioned in § 2256 were available to appellant in this case, he has not offered any evidence of reasonable apprehension of his liability to "instant death,"

such as is contemplated by that section, in view of the fact that all of the evidence of threats claimed as duress relates to threats made at least one whole day before the commission of the robbery, and there was no evidence as to when the threats might be carried into execution. We express no opinion on this question, however.

These are all of the errors claimed or argued by counsel for appellant. A review of the entire record convinces us that appellant had a fair trial, which was free from prejudicial error, and that there was abundant evidence to support his conviction. It is not a pleasant duty to have to write the last word in affirmance of a death sentence; but such is the means provided by the law of the land for the protection of society against crime of this nature. Whether or not it is the wisest and best means available to that end, is not within our province to decide. The facts shown by the record in this case, and the law applicable thereto, compels the affirmance of appellant's conviction. The judgment of the learned trial court is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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[No. 9885. Department One. January 10, 1912.]

F. M. ROTHROCK, *Respondent*, v. RAY HUNTER *et al.*,
Appellants.¹

SALES—CONTRACTS—CONSTRUCTION. A contract to purchase certain sheep unconditionally, and also to purchase three thousand lambs, with a ten-day option to the vendor to sell the lambs to other persons, after which time the lambs could not be sold to any other person, is a binding contract to sell the lambs to the purchasers, subject only to the ten-days' option to sell to other persons.

DAMAGES—MEASURE—BREACH OF CONTRACT. Upon breach of a contract to sell certain lambs, the measure of damages is the difference between the contract price and the value at the time of the agreed delivery.

SALES—BREACH OF CONTRACT—DAMAGES—EVIDENCE OF MARKET VALUE. Upon breach of a contract to sell lambs to be delivered at a certain place, at which there was no market value for them, other evidence of their value is competent, and experienced sheep men may testify as to their value without testifying in detail to their market value at other places, or the cost of transportation.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered March 28, 1911, upon findings in favor of the plaintiff, in an action for breach of contract, after a trial on the merits before the court without a jury. Affirmed.

Daniel T. Cross, G. G. Hannan, and Arthur McGuire, for appellants.

W. E. Southard, for respondent.

PARKER, J.—This is an action to recover damages, alleged to have resulted to the plaintiff by the failure of the defendants to deliver to him three thousand lambs, in compliance with the terms of the following written contract:

"This contract entered into this day between F. M. Rothrock, party of the first part, and Allyn & Hunter parties of the second part, is hereby agreed to be satisfactory to

¹Reported in 119 Pac. 1114.

both parties and binding to them. The party of the first part agrees and contracts to purchase from the parties of the second part, two thousand ewes (sheep), to be classed as follows: fifteen hundred of the ewes must be three years old, and the remaining five hundred to be either two or four years old. The said ewes are to be delivered either at McCue's Corrals in Douglas creek, in Douglas County, or at the Rudeo Place in Grant County, on October fifteenth, nineteen hundred and nine.

"The party of first part contracts and agrees to pay the parties of the second part four and one-half dollars per head upon delivery of said ewes. Party of the first part contracts further to purchase from the parties of the second part three thousand head of lambs, said lambs to be selected by the party of the first part from lamb bands now owned by parties of the second part, said band containing about forty-four hundred lambs. Said lambs are to be delivered at the same time and place as ewes mentioned in this contract. Said first party contracts and agrees to pay said parties of the second part three dollars per head upon delivery of lambs. Party of the first part hereby grants parties of the second part an option of ten days time, in which it is agreed by party of the first part that parties of the second part may dispose of the three thousand lambs mentioned in this contract to party or parties other than those mentioned in this contract. At the expiration of said option, said lambs can be sold by parties of second part to party of the first part only. It is understood and agreed by both parties that both ewes and lambs mentioned in this contract, are to be selected from bands now owned by parties of the second part.

"Receipts of five thousand dollars (\$5,000) is hereby acknowledged by parties of the second part to be paid on this contract. Dated and signed this second day of July, nineteen hundred nine.

"(Signed) F. M. Rothrock,
"Allyn & Hunter."

A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff for \$2,250 damages. From this judgment, the defendants have appealed.

It is contended by counsel for appellants that the trial court erred in overruling the appellants' demurrer to the

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complaint. This involves only the construction of the contract. It appears from the allegations of the complaint that appellants did not sell the lambs during the ten-day option period specified in the contract, nor at all. Appellants' counsel state their position as follows:

"We contend that the contract is one whereby plaintiff agrees to purchase and defendants to sell and deliver the ewes mentioned unconditionally; that the item as to the ewes is distinct from that regarding the lambs; that plaintiff agrees to purchase the lambs mentioned but that defendants do not bind themselves to sell or deliver. The defendants were not compelled to sell; they had a choice to sell to third persons during said ten days, but if the lambs were not sold during those ten days, then defendants could do but two things—sell to plaintiff or keep the lambs. They could not however sell to any person other than plaintiff after the expiration of said ten days."

It seems to us that, to give this construction to the contract, would be to render the making of that part of it relating to the lambs a mere waste of words. What possible purpose could there have been in mentioning the lambs in the contract in this manner if it was not to make an agreement for the sale of them by appellants to respondent, subject to be defeated by the "option of ten days' time, in which it is agreed by party of the first part that parties of the second part may dispose of the three thousand lambs mentioned in this contract to party or parties other than those mentioned in this contract?" Counsel rely particularly upon the words: "At the expiration of said option, said lambs can be sold by parties of second part to parties of first part only." From this it is argued that appellants are only obligated not to sell to any one else. This would mean that the only object to be attained by the language of the contract relating to the lambs was to limit the selling of them to respondent, but leave appellants free to elect whether or not they would sell at all. We agree with the learned trial court that more than this was meant by these parties in the execution of this

contract. Its language is somewhat involved, but we think it clearly evidences an intention to bind appellants to sell the lambs to respondent, subject only to the ten-day option permitting a sale to others. In 2 Page on Contracts, § 1122, we find applicable to these provisions, the rule of construction as follows:

"If terms in a contract appear on their face to be inserted for the benefit of one of the parties, he will be considered as having inserted such terms and as having chosen the language thereof. Any ambiguity in such language is therefore to be construed more strongly against the party making use of such language."

The trial court found that there was no market or market price for the lambs at the time and place of agreed delivery; that there were markets and a market price at other places, some distance away; that there were ready and convenient means of transportation between the agreed place of delivery and such places; that there would be some expense incident to such transaction; but that there was no evidence of the amount of the market value of the lambs at such places nor of the amount of the expense of such transportation. The language of these findings seems to us to be somewhat involved, but we believe the above is a fair statement of their substance. The court did find, however, in addition: "that the lambs in question were at the time the defendant agreed to deliver them to the plaintiff, to wit: October 15, 1909, of the value of \$3.75 per head." This it will be noticed is 75 cents per head more than the contract price, and accounts for the judgment being for \$2,250, upon the theory that respondent's damage was the difference between the contract price and the value of the lambs at the time of agreed delivery. The contention upon these findings is, in substance, that they are erroneous because not based upon market value and not supported by the evidence. It does appear that they are not based upon market value at the place of delivery; but this we think, under the circumstances, is no reason for excluding all consideration of the

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value at that place. There being no market value at that place, other evidence may be resorted to to prove their value at that place. 35 Cyc. 636; 24 Am. & Eng. Ency. Law (2d ed.), 1154.

The question of the sufficiency of the evidence is discussed in the briefs as though we had before us a statement of facts. No such statement, however, has been sent to this court. Enough appears by the uncontroverted statements in the briefs, however, to show that the testimony of experienced sheep men was introduced stating the value of these lambs at the time and place of delivery, which would be sufficient to support the judgment, though such testimony was not as to the market value at that place. It was not necessary that the amount of the market value at other places and the expense of transportation should be testified to in detail by those witnesses, though apparently they had knowledge of those facts and relied thereon in testifying to the value at the place of delivery. Professor Wigmore in his work on Evidence, vol. 3, § 1922, says:

"There is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his inference from them; all that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination."

The argument seems not to be directed against the weight of the evidence, but against the sufficiency of the evidence because of its failure to show market value at the place of agreed delivery. We think the value of the lambs at the place of delivery could be shown by evidence of the nature above mentioned, and it is not disputed that there was such evidence. This enables us to dispose of this contention in the absence of a statement of facts.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

[No. 9690. Department One. January 10, 1912.]

SEATTLE AUTOMOBILE COMPANY, *Appellant*, v.
F. S. STIMSON, *Respondent*.¹

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. One general exception to separate findings given some of which are correct, and to requests for separate findings refused, is insufficient to secure a review of the evidence; and the statement of facts will be considered only as to the rulings of the court on the admission and exclusion of the evidence.

WITNESSES—EXAMINATION—LEADING QUESTIONS. It is discretionary to permit leading questions.

EVIDENCE—LETTERS—COPIES. Copies of letters are inadmissible where there was no attempt to procure the production of the originals.

APPEAL—REVIEW—HARMLESS ERROR. It is harmless to exclude the answer to a question which would not have changed the result.

PAYMENT—CONDITIONS—CONTRACTS—CONSTRUCTION. In an action to recover a balance due on account, there is sufficient evidence of payment in full, where it appears that the plaintiff traded to the defendant land for an automobile owned by him, in consideration of which it was agreed that the balance due on the account should not be paid "until and unless" the land was sold for at least \$2,000, and if the land was not sold for said sum, that the exchange should be in full satisfaction of the claim; and there can be no recovery where the court finds that due diligence was used to sell the land but it could not be sold for \$2,000 or any other sum; since the payment was conditioned wholly and finally upon the sale of the land.

Appeal from a judgment of the superior court for King county, Prigmore, J., entered April 21, 1911, upon findings favorable to the defendant, in an action on account, after a trial before the court without a jury. Affirmed.

J. L. Waller, for appellant.

Chas. F. Munday, for respondent.

GOSE, J.—This is a suit to recover the balance due upon an account for goods sold and delivered by the plaintiff to

¹Reported in 120 Pac. 73.

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defendant. The alleged balance due is \$1,013.95. A judgment was entered in favor of the plaintiff for \$33.50, and it has appealed.

It is admitted that, between the 9th day of January, 1907, and the 19th day of August, 1908, the appellant sold and delivered to the respondent automobiles and automobile supplies of the value of \$16,574.15 and that the respondent paid thereon \$15,500.20. The contention of the respondent is that his obligation to pay the balance of the account in excess of the judgment was postponed in the manner and form stated in the findings of the court hereafter set forth.

The respondent has moved to strike the statement of facts because of the insufficiency of the exceptions. The court made four findings of fact, separately numbered and stated. The exception to the findings is in the following language:

"The plaintiff herein excepts to the findings of fact entered in the cause for the reason that the same are contrary to the evidence in the case."

The appellant submitted seven findings, which were also separately numbered, and which were refused by the court. It reserved a like general exception to the refusal of the court to make these findings. Such an exception has been held insufficient in a uniform line of decisions of this court. *Snohomish River Boom Company v. Great Northern R. Co.*, 57 Wash. 693, 107 Pac. 848; *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476; *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026; *Horrell v. California etc. Assn.*, 40 Wash. 531, 82 Pac. 889; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605; *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179; *Lilly v. Eklund*, 37 Wash. 532, 79 Pac. 1107; *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815; *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254. There being no specific exceptions to the findings, and some of them being admittedly correct, the exceptions were insufficient. The motion to strike the statement will be denied, but the objection to its consideration will be sustained excepting as to the rulings of the

court in admitting and excluding evidence. *Lilly v. Ek-lund, supra*.

It is first suggested that the court erred in permitting the respondent's counsel to ask a leading question. If the question was leading, which may well be doubted, the matter was within the sound discretion of the court.

The court refused to admit in evidence copies of certain letters written by the appellant to the respondent. This is assigned as error. The ruling was correct, as there had been no attempt to procure the production of the original letters.

The appellant's counsel propounded the following question to one of his witnesses: "Now what did the company [meaning the appellant] get out of that Stimson deal?" An objection to the materiality of the question was sustained. The ruling is assigned as error. The point is without merit. As we shall see later, an answer would not have changed the result.

The court found that the appellant, a corporation, was engaged in the business of buying, selling, dealing in, and storing new and second hand automobiles and automobile supplies, and dealing in and doing all things pertaining to and usually done in and about the business of a garage and automobile agency; that between the dates heretofore stated, it sold its goods to the respondent and received payments in the sums respectively stated. It further found:

"That on to wit, the 10th day of August, 1908, prior to the commencement of this action, the defendant, being then the owner of a second hand automobile, made and entered into an oral agreement with the plaintiff, who had said automobile for sale, under and by the terms of which agreement the said plaintiff made an exchange of said automobile for a tract of land, which said tract of land was conveyed to this defendant and accepted by him in exchange for said automobile upon and subject to the express condition and agreement between the defendant and the plaintiff that the bill which the said plaintiff had against the defendant at that

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time amounting to \$980.45 should not be presented for payment nor paid *until and unless* this defendant was able to and did sell said land for the sum of at least \$2,000; that since receiving a deed to said land said defendant has used his best endeavors to sell said land, and has used his best endeavors in various ways to dispose of the same for said sum of \$2,000, but has not been able to sell said land or to dispose of the same *for said sum, or any other sum*; that said land is not worth as much as \$2,000, and cannot be sold or disposed of for that sum; that it was understood and agreed at the time of the said transaction and the making of said exchange between the plaintiff and this defendant, and it was a part of said agreement that unless said land could be sold or disposed of *for at least \$2,000, the said exchange should be in full settlement, satisfaction and discharge of the claim set up in the amended complaint herein,*"

except the sum of \$33.50, for which the appellant was entitled to a judgment under the admissions in the pleadings. The writer has italicized the words in the finding quoted.

The appellant further contends that the findings of the court did not warrant the judgment. The precise point made is that, where there is a debt due, and it is agreed that it shall be paid upon the happening of a future event and the event does not happen, the law implies a promise to pay within a reasonable time. The following authorities are relied upon as upholding this view: *Williston v. Perkins*, 51 Cal. 554; *Chadwick v. Hopkins*, 4 Wyo. 379, 62 Am. St. 38; *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365; *Sears v. Wright*, 24 Me. 278; *Nunex v. Dautel*, 19 Wall. 560; *Busby v. Century Gold Min. Co.*, 27 Utah 231, 75 Pac. 725; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Noland v. Bull*, 24 Ore. 479, 33 Pac. 983; *Page v. Cook*, 164 Mass. 116, 41 N. E. 115, 49 Am. St. 449, 28 L. R. A. 759; *Works v. Hershey*, 35 Iowa, 340; *Capron v. Capron*, 44 Vt. 410.

In the *Williston* case, certificates were given by the defendant which recited that the holders were entitled to receive a stated sum of money when a certain schooner in course of

construction should be sold. Suit was brought upon the certificates before the vessel was sold. The court said that the defendants were entitled only to a reasonable time in which to finish and sell the schooner.

In the *Chadwick* case, the defense interposed was that payment of the plaintiff's demand was to be made "as soon and fast as they [the defendants] were able financially to do so without sacrificing their interest in or the property of said North Crow Land and Cattle Company," and that the event named had not arrived. The court held that the agreement allowed only a reasonable time in which to make payment, and that it was not a sacrifice of property to sell it at the market price.

In the *Randall* case, the contract was for the payment of the rigging of the vessel ninety days after its first return trip. The schooner was lost at sea on its first voyage. The court held that the money promised became due ninety days after the expiration of the period of time usually required for the return trip of the schooner.

In the *Sears* case, the note sued upon was made payable "from the avails of the logs bought of Martin Mower, when there is a sale made," and it was held that the contract contemplated a sale of the logs within a reasonable time. In the *Nunex* case the instrument sued upon was payable "as soon as the crop can be sold or the money raised from any other source." This was held to create an obligation to pay within a reasonable time. In the course of the opinion it was said: "Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned."

In the *Busby* case, the defendant agreed to repay the sum of money advanced "from the first profits of the mine." The court said that, when the money was loaned, the debt was created and became absolute, and that the event agreed upon "merely fixes the happening of such an event as a convenient time for making the payment, and in case no profit

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should be realized the law implies a promise to pay within a reasonable time."

In the *Crooker* case the promise was to pay the amount stated in the instrument "when I sell my place where I now live in Oxford, Maine." This was held to create an obligation to sell within a reasonable time. In the *Noland* case there was a written obligation to pay a fixed sum "when the sale of the property known as the Stephens ranch shall be accomplished, the said place to be sold for not less than \$2,500." In construing the instrument, the court said:

"The defendant promises to pay the five hundred dollars when the sale of the property shall be accomplished for a specified sum. There is a present debt, but its payment is postponed to a future time; yet the debt nevertheless exists. The defendant promises or undertakes to sell the property for the sum specified that he may discharge his indebtedness, and if he fails to do so, or is unable to sell the property, such indebtedness becomes due and payable within a reasonable time."

The court, however, adverts to the fact that the agreement is not "that the defendant will pay such amount if he succeeds in selling the ranch for such price." In the *Page* case, the stipulation was to pay "whenever payor and payee mutually agree." The court said that this language means that the note was to be paid "when and after the payor ought reasonably to have agreed." In the *Works* case, the maker agreed to pay the note "on demand . . . when convenient." The court said, construing the quoted words together, that an obligation was created to pay within a reasonable time. In the *Capron* case, the note was payable one year from date, with the added condition that "if there is not enough realized by good management in one year, to have more time to pay in the manufacture of the plaster bed on Stearns' land." This was construed to give the maker a reasonable time in which to pay after the expiration of the year in case he failed to realize enough from the plaster bed to enable him to pay within a year.

It is obvious that none of these cases are applicable to the facts found by the court. There were no negative words in any of these contracts. As we have seen, the absence of such words was pointed out in the *Nunez* and *Noland* cases. The contract here involved was that the item in controversy was not to be paid "until and unless" the property was sold for at least \$2,000," and that unless the land could be sold for "at least" that sum, "the said exchange should be in full settlement, satisfaction, and discharge of the claim." In other words the payment was conditioned "wholly and finally" upon the alternative mentioned. The court expressly found that, although the respondent had used due diligence, he had not been able to effect a sale for \$2,000, or any other sum. It is obvious from a reading of this language that there can be no recovery unless we rewrite the contract for the parties. It is not a question of construction, but rather a question of giving effect to words of an undoubted meaning.

"Parties may adopt any event as fixing the time for their obligations to mature, just as they may fix a date therefor." *Eaton v. Richeri*, 83 Cal. 185, 23 Pac. 286;

See, also, 9 Cyc. 615, 616, 700; *Lyman v. Northern Pac. Elevator Co.*, 62 Fed. 891; *Congdon v. Chapman*, 63 Cal. 357.

In the *Congdon* case a purchaser of mining stock agreed to pay for it "from the first moneys which can be realized from the sale of any stock of said company owned or controlled by him. . . . and . . . agrees to use all reasonable efforts to realize on the stock of said company owned or controlled by him without unnecessary delay." The trial court found that the defendant used reasonable diligence and made reasonable efforts to effect a sale of the stock, but that he had not been able to sell any of it. It was held upon appeal that, "under such circumstances, to hold the defendant liable in this form of action would be to make and enforce between the parties a contract essentially different from

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the contract that they themselves made." We think the same might have been said in the *Noland* and *Busby* cases, where the court reached a different conclusion.

From what has been said, it follows that the inquiry as to what the appellant got out of the trade was immaterial. It induced the respondent to make the exchange upon certain express conditions which have not been fulfilled. The contract was based upon a sufficient consideration; the parties were competent to contract and the contract is not immoral or illegal. It should therefore be enforced.

The judgment is affirmed.

PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 9797. Department One. January 10, 1912.]

THE CITY OF SPOKANE, *Appellant*, v. FREDERICK M.
CURTISS *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — BENEFITS. A city cannot be generally assessed for a public improvement unless it is specially benefited, nor merely because it was negligent in improving a street for the benefit of a street railway company without exacting an agreement from the company to contribute to the expense.

SAME — POWER TO ASSESS CITY. Under an ordinance for the improvement of a street the cost and expense to be paid "wholly by special assessment upon the property to be benefited," the eminent domain commissioners have no power to assess the city generally for a portion of the expense, in view of Rem. & Bal. Code, § 7785, conferring upon the city council the power to determine whether the cost should be made wholly by special assessment upon property benefited, or partly from the general fund of the city, and § 7790, authorizing the city council to fix an assessment district which "shall be conclusive and binding" on the commissioners.

SAME — ASSESSMENTS — REVIEW — CONFIRMATION. Upon confirmation of an assessment roll for a public improvement in a special district, the court must keep within the issues raised by the objections,

¹Reported in 120 Pac. 70.

and cannot direct a change in the district unless it is challenged by a property owner therein.

SAME—ASSESSMENT—STREET RAILWAY FRANCHISE. The franchise of a street railway is not assessable for benefits from a public improvement from the fact that the company was benefited thereby.

SAME—ASSESSMENTS—BENEFITS. Street improvements benefiting a street railway by enabling it to lay double tracks and reduce its curves are a benefit to the property in the district accessible thereto, although a part of the property in the district fronts upon another street car line; such fact going to the amount and not to the fact of the benefits.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 10, 1911, upon findings in favor of the defendants, modifying an assessment for public improvements upon confirmation by the superior court. Reversed.

A. M. Craven and Bruce Blake, for appellant.

Fred B. Morrill and Curtiss & Remele, for respondents.

GOSE, J.—This is an appeal by the city of Spokane, from a judgment modifying a report of its board of eminent domain commissioners. The facts are these: The city of Spokane, by ordinance declared that public necessity required that Howard street, between Maxwell and Spofford avenues, "be opened and widened, widened and extended, altered and straightened," and directed the corporation counsel to proceed to condemn certain property described in the ordinance for that purpose. In pursuance of the ordinance, a suit was instituted, and terminated in an appropriation of the property described in the ordinance. The judgment, including costs and the costs of making up the assessment roll, was \$5,676. The ordinance further provided that the cost and expense of the improvement should be paid "wholly by special assessment upon the property benefited."

The board of eminent domain commissioners, to whom the matter was referred, established an assessment district, and found that the total cost of the improvement should be borne

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by the property benefited, and "that no part of the cost thereof should be borne by the city." Objections were filed to the report of the commissioners, which may be summarized as follows: (1) That the assessment against the objectors' property exceeds the benefits; (2) that there is other property benefited by the improvement which is not included in the assessment district; (3) that the assessment is unequal and unjust, in that the Washington Water Power Company is the party principally benefited; and (4) that the public in general is benefited and should have been assessed.

For some years prior to the commencement of this proceeding, the Washington Water Power Company operated a double track electric street car system along Howard street, between the business and residential districts, except that, in that part of the street from a block south of Maxwell avenue to a block north thereof, it had only a single track. This company also operated a general street car system in the city. Prior to the condemnation proceedings, lot 1, lying immediately north of Maxwell avenue and west of Howard street, extended five feet into the latter street. The appropriation took this strip of ground, and a portion of the south end of this lot, and a portion of the south end of lots 2 and 3 adjoining it on the west. Subsequent to the appropriation, the Washington Water Power Company installed double tracks along the two blocks mentioned. The appropriation enabled it to make this improvement upon an easy curve at Maxwell avenue.

The court found, that the improvement, aside from the five-foot projection into Howard street, was made principally for the benefit of the Washington Water Power Company; that the city was charged with knowledge of that fact; that property abutting upon Cleveland avenue was included in the district, and that there was a street car line upon that avenue; that the cost of appropriating the portion of lot 1 extending into Howard street was \$1,000; that at least one-half of the balance of the cost of the improvement, viz.,

\$2,338, was of direct benefit to the Washington Water Power Company, and that all the property in the assessment district lying north of the alley between Buckeye avenue and Cleveland avenue, being contiguous to another street car line, is not benefited by the improvement. The judgment directed the board to recast the roll so as to exclude all property lying north of the alley between Buckeye avenue and Cleveland avenue, and to assess \$2,338 to the city.

The appeal presents two questions only: (1) Did the court err in directing the board to assess the city? and (2) did it err in directing it to exclude the property mentioned? Upon the first proposition the court was clearly in error. The board found, as we have seen, that no part of the cost of the improvement should be borne by the city. Two of the commissioners testified upon the hearing that the city was not benefited, and there is no testimony to the contrary. The court took the view that, because the city knew that the improvement would benefit the Washington Water Power Company, and that its franchise could not be assessed, the city should bear a part of the burden, because it failed to require that company to agree in advance of the appropriation to pay a part of the cost of the improvement. In other words, it in effect held that the city should be penalized for its negligence. This is not the law. The city, like a private owner, can only be assessed for an improvement where it is especially benefited. Rem. & Bal. Code, § 7790. *In re Fifth Avenue etc.*, ante p. 327, 119 Pac. 852. In that case, the court said:

"It will be obvious to any one who reads the special assessment statutes that it was the intent of the legislature to permit the assessment of only such property as was specially benefited (§ 7790), and that general benefits could not be made the basis of a levy."

Moreover, neither the commissioners nor the court had the power to direct that any part of the cost of the improvement should be borne by the city. The city itself had determined that question. As we have seen, the ordinance provided that

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the cost and expense of the improvement should be paid "wholly by special assessment upon the property benefited." A reference to Rem. & Bal. Code, § 7785, discloses that the language just quoted means private property. The language there is:

"When the ordinance under which said improvement is ordered to be made shall not provide that such improvement shall be made wholly by special assessment upon *property benefited*, the whole amount of such damage and costs, or such part thereof as shall not be assessed upon *property benefited* shall be paid from the general fund of such city or town, . . ."

While the view we have suggested is negatively stated in the language quoted, we think its meaning is reasonably clear. In speaking of the conclusiveness of such a determination by a municipality, in *Powell v. Walla Walla*, 64 Wash. 582, 117 Pac. 389, we said:

"Whether or not the cost of the improvement shall be borne wholly by the property benefited, wholly by the public at large, or in part by the property benefited and in part by the public at large, are questions solely within the jurisdiction of the municipal officers to determine, and the courts have no power to control their discretion in that regard."

The same rule is announced in *Northern Pac. R. Co. v. Seattle*, 46 Wash. 674, 91 Pac. 244, 123 Am. St. 955, 12 L. R. A. (N. S.) 121; and is suggested in *In re Fifth Avenue etc., supra*. The correctness of this view is made certain by the language used in the first proviso to Laws 1909, p. 724, Rem. & Bal. Code, § 7790. It is as follows:

"Provided, that the legislative body of the city may in the ordinance initiating any such improvement establish an assessment district and said district when so established shall be deemed to include all the lands or other property especially benefited by the proposed improvement, and the limits of said district when so fixed shall be binding and conclusive on the said commissioners."

The clear inference from the language used in the two sections, 7785 and 7790, is that the commissioners may estab-

lish the district and assess the property especially benefited, including the city, to the extent only that the city itself has not exercised the powers conferred upon it. We are not here concerned with the power of the court to direct that a portion of the cost of the improvement be made a charge against the city, when that question has been left open to the commissioners and they have or have not put a part of the burden on the city. This question was before the court in the following cases: *In re Pike Street*, 42 Wash. 551, 85 Pac. 45; *Spokane v. Gilbert*, 61 Wash. 361, 112 Pac. 380; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279.

We deem it proper, however, to say that the court cannot, upon the filing of the report of the commissioners, direct that the district be made either greater or less, or take any action therein other than to confirm the report unless and until its correctness has been challenged by a party in interest owning property within the district, and then it must, as in other cases, keep within the issues raised by the objections. Rem. & Bal. Code, §§ 7795, 7796.

The franchise of the Washington Water Power Company is not assessable. *In re Third Avenue*, 54 Wash. 460, 103 Pac. 807. The duty of the commissioners, therefore, was to establish an assessment district, and assess property especially benefited and legally assessable. The fact that the improvement is a benefit to the Washington Water Power Company, in that it enabled it to make its double track continuous along Howard street, and in that it reduced the curve of the track at the intersection of Howard street and Maxwell avenue, does not show that the property accessible to the Howard street car line is not benefited. Indeed, it may be said that, whatever contributes to the efficiency of the company's service or makes the operation of its cars safer is an especial benefit to the property in the district. Speaking to a like question in *In re Harvard Avenue North*, 47 Wash. 535, 92 Pac. 410, we said:

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"The improvement, it is true, may afford the railway company more convenient facilities for the extension and construction of its line; but such fact does not establish that benefit does not accrue to the property in the district. The mere fact that a street is so improved that a street railway seeks to extend its lines thereon may well be considered as an element of special benefit to the neighboring property."

The discussion of the first question practically disposes of the second. The commissioners testified that the property within the assessment district was benefited by the improvement, in that the double track within the two blocks, by making the service more efficient, benefited the property. The fact that the property excluded by the court fronts upon a street having a car line goes to the amount and not to the fact of the benefit. The Howard street car line is accessible from this property. There is nothing in the record to indicate that the board acted arbitrarily. *In re Everett*, 61 Wash. 498, 112 Pac. 658.

The judgment is reversed, with directions to confirm the report of the board of eminent domain commissioners.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9601. Department One. January 12, 1912.]

LULA POWELL, *Appellant*, v. JAMES POWELL, *Respondent*.¹

DIVORCE—CROSS-COMPLAINT—DEFINITENESS. Plaintiff is not entitled to have a cross-complaint for a divorce made more definite and certain as to the times and places at which and with whom adultery was committed, where no direct charge of adultery is made, although adultery might be inferred from the facts stated.

DIVORCE—PLEADINGS—CROSS-COMPLAINT—RESIDENCE—JURISDICTION. Where a complaint for divorce shows jurisdictional residence by the plaintiff, defendant's cross-complaint need not allege his residence in the county, nor in the state for one year preceding the commencement of the action, in order to give jurisdiction to grant a divorce upon the cross-complaint.

¹Reported in 119 Pac. 1119.

APPEAL—REVIEW—AMENDMENTS TO CONFORM TO PROOF—DIVORCE. Pleadings for a divorce will on appeal be deemed amended to conform to proof that the parties were residents of the county and of the state for one year preceding the commencement of the action.

APPEAL—REVIEW—HARMLESS ERROR—FINDINGS. Findings outside the issues in a divorce case do not vitiate a decree supported by other findings.

DIVORCE—DECREE—PROPERTY. Where the property cannot be divided without loss, it is proper to award it to the husband, with alimony to the wife.

DIVORCE—DECREE—COSTS—ATTORNEY'S FEES. An attorney's fee of \$75 in a divorce case is not unreasonably inadequate.

Appeal by plaintiff from a judgment of the superior court for Benton county, Holcomb, J., entered March 21, 1911, upon granting defendant a divorce and awarding alimony, after a trial on the merits. Affirmed.

J. W. Callicotte, for appellant.

Andrew Brown, for respondent.

FULLERTON, J.—The appellant brought this action against the respondent for a divorce and for such division of the property of the parties as to the court should seem meet and just. In her complaint she set forth the statutory requirements as to residence, and sought a divorce on the grounds of cruel treatment and personal indignities rendering her life burdensome. The respondent answered, denying the allegations of cruel treatment, and by a cross-complaint sought a divorce from the appellant on grounds similar to those set forth in the complaint. He did not, however, allege residence in the state for one year, nor residence in the county in which the action was brought. The appellant moved against the cross-complaint, asking that certain paragraphs therein be made more definite and certain. The motion was overruled, whereupon she replied, putting in issue the new matter in the complaint. A reference was thereupon had for a report upon the facts and law of the case. The referee took and reported the evidence into court and recommended

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that neither party be granted a divorce. Each of the parties thereupon moved the court to set aside the referee's findings, in so far as he recommended that no divorce be granted. The court reheard the case and granted a divorce to the respondent, awarding the appellant her costs expended in the proceedings, \$75 for attorney's fees, and \$20 per month alimony, and awarded to the respondent the corporeal property held by them in community. From the decree this appeal is prosecuted.

The appellant first assigns that the court erred in overruling her motion to make the respondent's cross-complaint more definite and certain. It is assumed by the appellant that the paragraphs complained of made charges of adultery against her, and she claims that she is entitled to a statement of the times, places, and persons at which and with whom the adultery was committed. But we think the cross-complaint sufficiently certain. It contained no charge of adultery. True, it alleged that the appellant left her home at various times and remained away for weeks at a time, and would give the respondent no information on her return as to her whereabouts, or as to the persons with whom she associated while gone. It may be that adultery could be inferred from these facts, but they contain no definite charge of adultery, and the respondent was not obligated to make them more definite and certain in that respect.

It is next asserted that the court erred in granting a decree of divorce to the respondent, since he did not allege that he had been a resident of the state of Washington for more than one year prior to filing his cross-complaint, and did not allege that he was a resident of the county in which the action was brought. But this allegation was not necessary to support the cross-complaint. Where the plaintiff's complaint shows jurisdiction in the court over the subject-matter and the defendant appears personally in the action, the court has jurisdiction to award such relief as the facts warrant, even to granting a divorce to the defendant on a cross-

complaint. *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431; *Pine v. Pine*, 72 Neb. 463, 100 N. W. 938, 9 Ann. Cas. 1198. The case of *Van Alstine v. Van Alstine*, 23 Wash. 310, 63 Pac. 243, is not contrary to this view. In that case, neither party was a resident of the state of Washington, and hence neither of them could maintain an action therein for divorce. Moreover, in the case at bar, the evidence disclosed that each of the parties had been residents of the state of Washington for many years prior to the commencement of the action, and that each of them resided in the county in which the action was brought. In such a case, we will treat the pleadings as amended to conform to the proofs. *Ramsdell v. Ramsdell*, 47 Wash. 444, 92 Pac. 278.

It is next objected that the findings on which the decree rest are not responsive to the issues, but we think otherwise. It is true that the court found that the appellant was guilty of having illicit intercourse with a certain man named, and that no allegation to that effect was made in the cross-complaint. But this does not avoid the decree. Other facts sufficient to sustain the decree which were within the allegations of the cross-complaint were found by the court, and the fact that the court may have made findings outside of the allegations of the complaint does not destroy the effect of those properly found.

Finally, it is complained that there was not an equitable distribution of the property of the parties, and that the attorney fee awarded was too small. With reference to the property, the record shows that it was badly encumbered, and otherwise of such a nature that it could not be divided without lessening its value. In such a case, it is proper for the court to award the property to the husband, and charge the husband with the duty of paying alimony to the wife. The allowance of alimony was abundantly large under the circumstances. The attorney fee also was sufficient.

The decree appealed from is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

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[No. 9800. Department One. January 12, 1912.]

MARY L. HOLLENBAEK, *Appellant*, v. J. H. CLEMMER,
Respondent.¹

NEGLIGENCE—DANGEROUS PREMISES—STEPS—EXIT OF THEATER. The mere fact that one step down is maintained at a side exit of a moving picture theater is not evidence of negligence, where the way was properly lighted.

Appeal from a judgment of the superior court for Spokane county, Yakey, J., entered May 17, 1911, upon the verdict of a jury rendered in favor of the defendant by direction of the court, dismissing an action for personal injuries sustained by a visitor in leaving a theater. Affirmed.

Harris Baldwin, for appellant.

Skuse & Morrill, for respondent.

MOUNT, J.—The plaintiff brought this action to recover for personal injuries. At the close of plaintiff's case, the trial court sustained defendant's motion for a directed verdict, and dismissed the action. Plaintiff has appealed.

It appears that on October 11, 1910, the respondent was conducting a moving picture show in the city of Spokane. The plaintiff and two other ladies purchased tickets and entered the room where the pictures were being shown. The exhibition was in progress when they entered. The room was darkened. When they entered, an usher met them at the entrance, and conducted them to seats about two-thirds of the way down an aisle. They remained seated until the pictures had all been shown and a repetition was begun, when the plaintiff stated to her companions that it was time to go. Plaintiff walked into the aisle on her way out of the building, and proceeded a short distance out by the way she had entered, when she was met by an usher and directed to go out through an exit at the side of the room. She proceeded to the exit indicated, where a bright light was lo-

¹Reported in 119 Pac. 1114.

cated directly in the corridor, and where there was a step down of about seven inches; an ordinary step to the floor of the corridor. She did not notice this step. She testified that the bright light dazzled her as she came out of the darkened room; and as she stepped into the corridor, she fell and broke her leg. The plaintiff had never been in the place before, and was not acquainted with the arrangement thereof.

It is argued by the appellant that it was negligence to maintain the step at that place, and also negligence to direct the plaintiff to depart by a way other than the way by which she had entered. There is no merit in these contentions. It is no doubt the rule that an owner of a place of public entertainment is charged with the duty to maintain a reasonably safe place for his patrons. 38 Cyc. 268. The mere fact that a step up or down, or a flight of steps up or down, is maintained at the entrance or exit is no evidence of negligence, especially if the step is in good repair and in plain view. There is no claim in this case that the step was in bad order or not properly lighted, or was not in plain view of any person who might use it. In *Dunn v. Kemp & Hebert*, 36 Wash. 183, 78 Pac. 782, we held that it was not negligence *per se* to maintain a stairway in a store or public place. It is not uncommon to find a step up at the entrance of places where the public is invited, and it is certainly not negligence, as a matter of law, to construct floors above the level of the streets or sidewalks. It follows that it was not negligence to maintain a step down at the exit in question. It is apparent that it was the plain duty of the plaintiff to use her sense of sight and look where she was stepping. If it was not negligence to maintain the step, it was not negligence for the defendant to direct the plaintiff to retire by that exit.

There was no error and the judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

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Statement of Case.

[No. 9755. Department Two. January 13, 1912.]

JOHN MCINTYRE *et al.*, *Appellants*, v. CORA D. JOHNSON
et al., *Respondents*.¹

CONTRACTS — CONSTRUCTION — PERFORMANCE OR BREACH — VENDOR AND PURCHASER. Where defendant agreed to procure plaintiffs the title to land at the purchase price of \$450 per acre, which would make the price \$6,750, and agreed that with plaintiffs' payment of \$3,750 cash, he would pay off all past due claims against the land, leaving only a note of \$3,000 coming due in January to be assumed by the plaintiffs, his failure to pay \$533 interest then due on the \$3,000 note is a breach of his contract, for which he is liable in damages.

VENDOR AND PURCHASER — CONTRACT — BREACH — REMEDIES OF VENDEE — DAMAGES. Where a contract for the conveyance of land is breached by the failure to pay off a claim against the land, the vendee may retain the land and sue for damages for breach of the contract, without offering to rescind.

BROKERS — CONTRACT — LIABILITY TO PURCHASER — PRINCIPAL AND AGENT. Where the owners authorized defendant to sell land to reimburse himself for indebtedness and to retain any excess as pay for his services in making the sale, defendant's agreement with plaintiffs, the vendees, to procure a clear title and to discharge all claims against the land for a specified sum, is his personal contract, and the owners are in no way liable thereon; as the contract could be enforced only against parties thereto.

APPEAL — DECISION — REMAND. Upon reversing a nonsuit, granted at the close of plaintiffs' case, the case must be remanded for a new trial, notwithstanding that the testimony of the defendant, when called as a witness for the plaintiff, indicates that the plaintiff would be entitled to judgment; since the defendant cannot be foreclosed from making his defense.

Appeal from a judgment of the superior court for Spokane county, Gay, J., entered May 27, 1911, upon findings in favor of the defendants, dismissing an action on contract, upon granting a nonsuit, after a trial to the court. Reversed.

D. R. Glasgow, for appellants.

John C. Kleber, for respondents.

¹Reported in 120 Pac. 92.

MORRIS, J.—On September 19, 1910, respondents Johnson held a contract for the purchase of certain lands, in Spokane county. Being unable to meet the payments then due and to become due, they arranged with respondent Bedtelyon, to whom they were indebted for certain services in planting and caring for an orchard on the land, to procure a purchaser for their contract at such a price as would reimburse them for the payments they had made and pay Bedtelyon the money due him, allowing Bedtelyon to retain for his services in procuring such purchaser any sum he might obtain in excess of the amounts then owing. Bedtelyon approached appellants in regard to a purchase of the contract, offering it to them at a price of \$450 an acre, which would make the purchase price to appellants \$6,750, which sum was finally agreed upon. It was then agreed that appellants should pay \$3,750 in cash to Bedtelyon, out of which he would pay all outstanding claims against the lands, except a \$3,000 note due the following January, which appellants assumed, making the \$6,750 agreed upon as the price of the land. In order that there may be a clear understanding of what the agreement was in regard to the price to be paid, we quote from the testimony of Bedtelyon, which, in our judgment, establishes the merits of the controversy contrary to the holding of the court below in dismissing the action. This testimony is the most favorable in support of respondents' contention, and they should have little cause for complaint if the cause of action against them is established out of their own mouths. This testimony was as follows:

"I told Mr. McIntyre that I would clean up everything, but the \$3,000 note, if he wished to buy it, and turn over a clear title, his assignment of contract and everything except the \$3,000 note that was not due, so that everything past due would be paid up and all there was coming up would be the \$3,000 note coming due in January. Q. Then the purchase price was \$6,750? A. \$450 an acre; yes, sir. Q. And he was to get everything clear except the \$3,000 note?

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A. Nothing said about the \$3,000. I said I would clear up everything against the contract. Those are the words we used, except the \$3,000 note due in January."

There can be little doubt from this testimony but that, as contended by appellants, the entire purchase price of the land to be paid by them was \$6,750, and that out of the cash payment of \$3,750 Bedtelyon agreed to pay all sums due upon the contract except \$3,000, which was the only payment to be assumed by appellants. Upon this understanding, appellants paid Bedtelyon \$3,750, and obtained an assignment of the contract. Bedtelyon paid all claims against the land, and took up the two notes then due, but failed to pay \$533 interest then due upon the \$3,000 note, which appellants subsequently paid to protect the contract, and brought this action against the Johnsons and Bedtelyon to recover the amount from them, basing the right of action upon the contract with Bedtelyon. The action was dismissed by the court below upon the theory that the action was based upon fraud, but that neither the complaint nor the proof established such an action, and that appellants could recover only upon tendering back the contract and suing for the amount paid.

We cannot agree with the trial court. The complaint makes no attempt to set up an action based upon fraud. It sets forth the making of a contract by Bedtelyon, acting for himself and as agent for the Johnsons, to sell the land for a total price of \$6,750, and representing that all claims against the land had been paid except the principal of the \$3,000 note, when in fact the sum of \$533 was then due and unpaid as interest on the \$3,000 note; that, believing such to be the fact, appellants made no investigation to ascertain the true facts. Whether an action for fraud, or any other sort of action, would lie under these facts is immaterial. The only thing that need be discussed, since no attack is made upon the complaint and the only defense is a general denial and lack of diligence, is, Does the complaint and proof thereun-

der entitle appellants to a recovery? The testimony of Bedtelyon establishes an agreement to procure an assignment of the Johnson contract to appellants for \$6,750; that out of the cash payment of \$3,750 Bedtelyon would pay all claims against the land then due; that the only payment to be made by appellants was \$3,000 represented by a note due in January, and that the total price to be paid by appellants was \$6,750, increased by such interest as they allowed to accumulate on the \$3,000 note from the date of their purchase, as the \$6,750 was understood to represent the amount necessary to be paid to free the land from all charges up to the date of the contract.

Considering this as an enforceable contract—since the only defense to it is a general denial—when Bedtelyon breached it by failing to pay the interest then due on the \$3,000 note, irrespective of any other right of action then accruing, appellants could bring an action to enforce their rights under the contract, and compel the payment of this \$533 as one of the items Bedtelyon agreed to pay. They were not compelled, as suggested by the trial court, to surrender the fruits of their contract. They could retain all its benefits, and seek the aid of the law in compelling Bedtelyon to pay them the damages sustained by them because of his failure to perform his agreement. Appellants were not seeking, nor was it necessary that they should seek, a rescission of their contract and ask that all parties be placed *in statu quo*. Rather were they seeking, as was their undoubted right, an enforcement of the contract. This contract could, however, be enforced only against those party to it. There is no evidence to justify a recovery against the Johnsons, either as principals or through any agency of Bedtelyon. It was for the interest of Bedtelyon to make this contract. It was the only way he could get his money out. The only interest the Johnsons had in the transfer was their equity in the contract, and Bedtelyon was left to his own devices to make an arrangement that would let him out and give him an additional

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profit, if he could make it. He choose the method adopted in his contract with appellants. It was his contract, and he only can be compelled to respond to its fulfillment.

Upon motion of respondents Johnson, a nonsuit was sustained as to them. This ruling we sustain. The same motion was made in behalf of respondent Bedtelyon, which does not appear to have been passed upon by the court. Bedtelyon was called as a witness by appellants after these motions were made, in an attempt to prove agency; and while such witness, testified fully as to all the facts surrounding the making of the contract. During his cross-examination, without anything more being said upon the motions, the court granted the motion as to respondents Johnson, and after the conclusion of such examination, indicated its view as to the law of the case, and dismissed the action. In the formal judgment, a recital is made that it is one of nonsuit, and we must so regard it. While, therefore, we are of the opinion that the evidence before us entitles appellants to a judgment in their favor as prayed for, we cannot enter such judgment here, nor direct its entry in the court below, and thus foreclose respondents of anything they may be prepared to offer in defense of the action.

The judgment is therefore reversed as to respondent Bedtelyon, and the cause remanded for further proceedings.

DUNBAR, C. J., CHADWICK, CROW, and ELLIS, JJ., concur.

[No. 9919. Department One. January 13, 1912.]

MARTIN LEE, *Respondent*, v. STEINHART LUMBER COMPANY
et al., *Defendants*, K. W. STEINHART, *Appellant*.¹

CORPORATIONS — REPRESENTATION — ACTION BY STOCKHOLDER — ACCOUNTING. A minority stockholder may maintain an action for an accounting on behalf of the corporation against a stockholder and officer where the majority of the stockholders and of the trustees do not desire an accounting and refuse to act.

SAME—RIGHT TO ACCOUNTING—DEFENSES—REFUSAL. The fact that a corporation stockholder and officer gave expert accountants assistance after the books had been obtained by legal process, does not show that he never refused an accounting, or defeat the right thereto, where it appears that he did not acknowledge the correctness of the experts' statement or admit any liability thereon.

SAME—ORGANIZATION—PAYMENT OF PARTNERSHIP DEBTS—EVIDENCE—SUFFICIENCY. Findings to the effect that, on the formation of a corporation, by three stockholders, all the debts of a former co-partnership existing between two of them were not agreed to be paid by the new concern, are sustained, where of the three, two interested witnesses testified that only certain specified debts were included, one of them testifying against his own interest.

Appeal from a judgment of the superior court for Thurston county, R. F. Sturdevant, Esq., judge *pro tempore*, entered April 27, 1911, upon findings in favor of the plaintiff, in an action for an accounting. Affirmed.

Frank C. Owings and Thos. L. O'Leary, for appellant.

E. N. Steele, for respondent.

FULLERTON, J.—This is an action for an accounting. To an understanding of the controversy a somewhat extended statement of the facts is necessary. It appears that, for some time prior to January 23, 1906, the appellant, K. W. Steinhart, owned and operated a factory for the manufacture of porch columns and certain other forms of wood products, the factory being located at Bucoda, Washington. On that

¹Reported in 119 Pac. 1117.

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Opinion Per FULLERTON, J.

day he sold a one-half interest in the business to one B. E. Loomis, for a specified consideration, and entered into an agreement with Loomis to the effect that he (Steinhart) should conduct the business of the factory at a fixed salary per month and divide the net profits of the business with Loomis. This relation continued until January 23, 1908, when the respondent Lee became interested in the business. At that time a corporation was formed with a capital stock of \$12,000 of which Lee, Loomis and Steinhart each subscribed for one-third. Loomis and Steinhart paid for their shares by turning into the corporation the factory and stock on hand; subject to an indebtedness, as Lee and Loomis understood it, of \$1,706.19, and as Steinhart contends, of \$9,214.97, owing by the partnership. Lee agreed to pay for his stock \$4,000 and actually paid thereon \$3,800.36.

On the formation of the corporation, Steinhart was elected president, Lee, vice president, and Loomis, secretary. Steinhart, however, was put in charge of the business and managed it without hindrance or control until the factory was destroyed by fire on June 28, 1908. The factory and stock were insured; and after the fire, Steinhart collected for the corporation, from the insurance companies, some \$13,030.95, and collected from sales of the remnants left after the fire several hundred dollars more. He then paid the corporation's obligations, and reported to the other stockholders that the funds of the corporation were exhausted. Thereupon Lee and Loomis, in their own names and in the name of the corporation, began an action against Steinhart for an accounting. Loomis also instituted an action against Steinhart for an accounting of the partnership business.

After issue had been joined in the actions, the several parties secured expert accountants and had them go over the books of the concern. On their report, Loomis instructed his counsel to dismiss his action for an accounting of the partnership affairs, and also the action brought in the name of the corporation for an accounting of the corporation's

business. Such a motion was made by his counsel; but Lee, who was represented by his private counsel, resisted the motion in so far as it applied to an accounting of the business of the corporation. The court granted the motion, allowing Lee, however, to continue the action in his own name on behalf of the corporation against both Steinhart and Loomis. Lee thereupon filed an amended complaint for an accounting against Steinhart, making Loomis a party defendant thereto. Issue was joined on the complaint and an accounting had, in which it was found that Steinhart had expended some \$9,214.97 on debts incurred by the partnership prior to the formation of the corporation, whereas he was only authorized to expend \$1,706.19 for such debts, and judgment was rendered against him in the name of the corporation for the difference between these sums, less a small balance due the partnership which was collected and intermingled with the funds of the corporation. Steinhart appeals from the judgment so entered.

The appellant first assigns that the court erred in permitting Lee to maintain an action for an accounting after the action begun for that purpose by the corporation had been dismissed. He argues that a stockholder of a corporation, as such, cannot maintain an action against another stockholder of the corporation for an injury to the corporation, but contends that all such wrongs must be redressed by the corporation itself and in the corporate name. Such undoubtedly is the general rule, and such is the rule of the case of *Nimmeman v. Fox*, 43 Wash. 43, 86 Pac. 213, cited by the appellant to maintain his contention. But the rule has an exception, recognized also by the case cited. A stockholder may maintain such an action where he is a minority stockholder and the corporate authorities representing the majority stock refuse to act. The case at bar falls within the exception. No accounting was desired by either Steinhart or Loomis, and they represented not only the ma-

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jority stock of the corporation, but constituted a majority of its trustees also.

It is true, Loomis at first joined with the respondent in the action against Steinhart, but he discovered, as soon as the books were experted, his own probable liability for the return of the money paid on the partnership indebtedness by Steinhart in excess of the amount agreed upon to be paid at the time the corporation was formed; that is, he discovered that his interests lay with Steinhart, and hence refused to further consent to any proceeding on behalf of the corporation that might establish a liability on his part to the corporation. His refusal to act left Lee in the minority, and Lee was thereafter entitled to maintain the proceedings in his own name on behalf of the corporation.

In this same connection it is urged that an accounting was never refused by Steinhart, but the facts hardly justify this contention. After his co-incorporators had obtained possession of the books by legal process, he gave the experts such assistance as they needed to make up a statement from the books; but he at no time acknowledged the correctness of any such statement; much less did he admit liability to the corporation for the amount he had overpaid on the partnership debts. This did not constitute an accounting, and did not defeat the right of the minority stockholder to maintain an action against him in the name of the corporation for an accounting.

The second principal contention is that the evidence does not warrant the conclusion that Steinhart was not authorized to pay all of the debts of the partnership out of the earnings and assets of the corporation. But we think the evidence overwhelming on this question. Lee, as well as his wife and daughter, testify that the only debts mentioned consisted of a note for \$1,000 due a certain bank, and the labor bills contracted during the preceding month, which were afterwards ascertained to be \$706.19. Loomis, testifying against his interest, made the same statement also. Opposed to this,

is the testimony of the appellant, and his evidence is much weakened by the fact that he does not pretend that he stated to either Lee or Loomis the exact amount the partnership was indebted, but asserts that it was agreed that *all* of the partnership indebtedness should be paid. But conceding this to be true, it is evident that both Lee and Loomis understood him to mean that the specific debts enumerated were all of the debts owed by the partnership. In either case, he paid the excess without right, and is obligated to return it to the corporation.

On the whole of the record, we think the judgment should be affirmed, and it will be so ordered.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9756. Department Two. January 13, 1912.]

WILLIAM R. WINDSOR *et al.*, Appellants, v. P. J. SARSFIELD
et al., Respondents.¹

ESTOPPEL — BOUNDARIES — ACQUIESCENCE IN IMPROVEMENTS. The vendor is estopped to recover possession of land within an inclosure shown to the vendee as the boundary line, where no survey was made and no protest was made while the vendee went into possession, cultivated the land up to the line, and erected near the line on the land in dispute a dwelling costing \$7,000.

ESTOPPEL—EVIDENCE—PRESUMPTIONS AND BURDEN OF PROOF. The rule that evidence to sustain an estoppel to claim land must be clear and convincing does not apply where the conduct of the parties is not relied upon to overcome a writing, and the evidence on both sides is of the same kind.

BOUNDARIES — ESTABLISHMENT — AGREED LOCATION. Practical or agreed location of a boundary line results where a fence on the supposed boundary was pointed out to the vendee, who took possession and made valuable improvements close to the line without any protest upon the part of the vendor, and the same was acquiesced in for seventeen years.

¹Reported in 119 Pac. 1112.

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Opinion Per CHADWICK, J.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 28, 1911, upon findings in favor of the defendants, in actions involving a disputed boundary line, after a trial to the court. Affirmed.

McWilliams, Weller & McWilliams (Robertson & Miller, of counsel), for appellants.

Cannon, Ferris, Swan & Lally, for respondents.

CHADWICK, J.—This is a suit over a disputed boundary line. In 1890, the property being owned by appellants, a fence was built a part of the way along the east boundary of the tract of land now owned by respondents. In 1892, the land was sold to a man named Cook, who began the erection of a fence along the east line, to connect with the fence already erected. He was told that the fence was east of what was perhaps the true line, and accordingly set his fence over so that, when he came to the fence that had been erected by appellants, he made a right angle turn, or as it is described, a jog of six or eight feet. Cook and one of the appellants had measured the boundaries of the land with a rope. For reasons not now material, Cook gave up the land, and it reverted to the vendors.

In 1900, the land was sold by appellant W. R. Windsor to these respondents. No survey was made, but respondents were taken on the land, which was fenced in one inclosure, its boundaries were pointed out, and they were told that it contained fifty acres more or less. Respondents have erected valuable improvements thereon, a dwelling house costing about \$7,000 being erected near the east boundary as defined by the fence, but which is without the boundary of the government subdivision, as ascertained by a survey which appellants had made in 1907; the true line being about 108 feet west of the fence at the south boundary of the quarter section corner, and about fifty feet west of the fence at the north boundary of the quarter section corner.

While there is some conflict in the evidence, the testimony of respondents, upon which the findings of the trial judge are predicated, shows that, aside from the fact that respondents were led to believe that they were purchasing all of the land within the inclosure, they have since gone into possession, cultivated or occupied all of the land that was tillable up to the line fence as it had been established, and appellants had made no protest, either as to the use of the land or to the making of the improvements aforementioned. While there are two distinct suits brought to this court, they are governed by the same legal principles and will be treated as one. The court below held appellants estopped to maintain an action to recover the land, and an appeal is prosecuted, appellants relying upon the established principle that evidence of estoppel in this class of cases should be of such clear and convincing character as to leave no doubt in the mind of the court.

While the appellants have said that they informed respondents before and while building their house that it was upon disputed ground, and that they should have the line surveyed, the trial judge, by reference no doubt to the undisputed facts and manner and demeanor of the witnesses, was satisfied that equity would not be done if appellants were allowed to prevail. While it is true that evidence to sustain an estoppel in cases of this character should be clear and convincing, yet the rule is generally applied where the conduct of parties is relied on to overcome some writing out of which the rights or relations of the parties originated. Where the evidence on both sides is of the same kind, it follows that a court must be governed by the ordinary rules of evidence. When so considered, we have no doubt of the correctness of the court's conclusion. *Edwards v. Fleming*, 83 Kan. 653, 112 Pac. 836; *Lydick v. Gill*, 68 Neb. 273, 94 N. W. 109; *Ross v. Ferree*, 95 Iowa 604, 64 N. W. 683; *Redmond v. Excelsior Sav. Fund & Loan Ass'n*, 194 Pa. St. 642, 45 Atl. 422, 75 Am. St. 714; *Marines v. Goblet*, 31 S. C. 153, 9 S.

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E. 803, 17 Am. St. 22; *Leifheit v. Neylon*, 139 Iowa 32, 117 N. W. 4; 5 Cyc. 930.

While the foregoing discussion disposes of the contentions of all of the appellants, W. R. Windsor and wife are precluded from recovering by reference to another rule—that of agreed boundaries. The measurement of the land at the time Cook set his fences, and the pointing out of the boundaries to respondents at the time they purchased and went into possession, are sufficient to overcome any right that the last named appellants may have had in the land.

“Practical or agreed location of a boundary line may result from long acquiescence in its location, or when drawn and acted upon by the parties, as where valuable improvements are placed with reference to it and before it is denied by either party.” *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084.

In that case we adopted the rule laid down in *Flynn v. Glenny*, 51 Mich. 580, 17 N. W. 65:

“The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case they must govern, notwithstanding any errors in locating them.”

See, also, *Steinhilber v. Holmes*, 68 Kan. 607, 75 Pac. 1019.

Finding no error, the judgment of the lower court is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9714. Department One. January 15, 1912.]

JAMES B. METCALFE, *as Executor etc., et al.*, Appellants, v.
JOSEPH SACKMAN, *Respondent*.¹

TRUSTS—RESULTING TRUST—EVIDENCE—SUFFICIENCY. A resulting trust in lands will not be declared where the evidence is not clear, certain and conclusive and so cogent as to leave no reasonable doubt, especially where nearly fifty years elapsed since the transaction occurred.

APPEAL—REVIEW—HARMLESS ERROR. On a trial *de novo*, error in the exclusion of a deposition which is brought up on appeal is harmless.

Appeal from a judgment of the superior court for Kitsap county, Albertson, J., entered December 10, 1910, dismissing, on the merits an action to declare a trust, after a trial to the court. Affirmed.

James B. Metcalfe and Allen & Allen, for appellants.

John E. Humphries and E. P. Edsen, for respondent.

PER CURIAM.—On November 1, 1865, the United States of America issued letters patent to one Daniel J. Sackman, "for the lot numbered one of section twenty, the lot numbered five of section thirty-two, the lot numbered one of section thirty-three, and the lot numbered two of section thirty-four, in township twenty-five, north, of range one east, in the district of lands subject to sale at Olympia, Washington Territory." The patent was issued under the act of Congress of April 24, 1820, entitled "An act making further provision for the sale of the public lands," the entry at the local land office being what is commonly known as a cash entry. On November 27, 1872, Sackman conveyed the land, with other lands, to his son Joseph W. Sackman, who has held the legal title thereto and paid the taxes thereon from thence up to the present time. Daniel J. Sackman lived some

¹Reported in 120 Pac. 84.

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Opinion Per Curiam.

seventeen years after making the deed, dying on May 30, 1889.

On April 29, 1893, the present action was begun by William Chico, Mrs. Long Thomas, Louisa Nelson, Mary Steve Wilson, and Old Sigo, against Joseph W. Sackman, to recover lot 5 in section 32, and lot 1 in section 33 of the lands above described, on the ground that Daniel J. Sackman had purchased the same from the United States for their use and benefit, and with money furnished him by certain of them and the predecessors in interest of the others for that purpose. Issue was joined on the complaint, and a large number of depositions taken. The action was then allowed to slumber until the year 1910, when it was revived and brought on for further proceeding. In the meantime all of the original plaintiffs had died, and the action is now represented by their personal representatives. The action was brought on for trial on November 30, 1910, and resulted in a dismissal of the same for want of equity on December 1, 1910. This appeal followed.

The claimants of the land were Indians of the full blood. Daniel J. Sackman was a white man who married a relative of the Indian claimants, or at least a woman from the general family to which they belonged. The testimony to support the claim of the appellants rests entirely in parol, and consists of the evidence of the claimants themselves and certain admissions made by Daniel J. Sackman during his lifetime concerning the ownership of the property. The claimants testify that the property in question was their old time home; that they desired to purchase it from the United States, and to that end gave Daniel J. Sackman the necessary money to pay the government price therefor at a time when he was starting to Olympia to purchase certain lands on his own account; that Sackman took the money and purchased the land, but took title in his own name under an agreement to convey it to the claimants at such time as they should desire him to do so. There is some evidence to the effect that he

subsequently executed a deed purporting to convey the property to them, but discovering that he had already deeded the property to his son, did not deliver it, but sought to have the son convey it over. On the other side, much of this evidence is contradicted by witnesses produced on the part of the respondent, and there are circumstances in the record which tend strongly to support the respondent's theory of the case. There was undoubtedly some dealings between Sackman and the Indian claimants concerning the land, but we think it was an effort on their part to purchase the land from him, rather than a purchase by him for them in the first instance.

To establish a resulting trust in land, the proofs must be clear, certain and conclusive. It should be so cogent as to leave no reasonable doubt in the mind of the trier of the fact. This evidence is not thus convincing, and considering the long lapse of time—nearly 50 years—since the transaction is thought to have occurred which gives rise to the cause of action, we think the evidence insufficient to support the claim.

We have not overlooked the appellants' claim of error concerning the exclusion of a certain deposition offered by the appellants. The deposition is in the record, and we have perused it with care. To our minds it is not sufficiently persuasive to change the result, even were it admissible, and as the case is triable *de novo* in this court, it is unnecessary that we pass upon its admissibility.

The judgment is affirmed.

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Statement of Case.

[No. 9688. Department One. January 15, 1912.]

NELLIE FAIRFAX, *as Administratrix etc., Appellant*, v.CATHERINE WALTERS *et al., Respondents*.¹

JUDGMENTS—CONCLUSIVENESS—FINALITY. An order in probate setting aside a homestead to a widow is *res adjudicata*, if the court had jurisdiction and the administrator appeared or had sufficient notice to appear and try out the question.

HUSBAND AND WIFE—COMMUNITY PROPERTY—EXECUTORS AND ADMINISTRATORS—HOMESTEAD FOR WIDOW—TITLE CONFERRED—STATUTES. Under Rem. & Bal. Code, §§ 1465, 1466, authorizing the probate court to set aside a homestead for the support of the widow and children, if none was selected by the deceased in his life, which homestead shall be exempt from debts and not treated as assets of the estate, an order setting aside to the widow a homestead from community property vests in her the title in fee, if the court had jurisdiction to make the order.

EXECUTORS AND ADMINISTRATORS—HOMESTEAD FOR WIDOW—APPRAISAL AND ORDER—NOTICE—JURISDICTION—JUDGMENT—CONCLUSIVENESS. Under Rem. & Bal. Code, §§ 1465, 1466, making it the duty of the probate court when certain facts appear to set aside a homestead of a specified value for the care and support of the widow and children, which homestead shall not be assets in the hands of the administrator, an order appraising and setting aside a homestead upon the widow's petition, filed in the probate case, is a proceeding within the administration of the estate requiring no personal service upon the administrator as in the case of an original proceeding; but notice to the attorney authorized to represent the administrator in the administration of the estate confers jurisdiction to make the appraisal and order, which is final and conclusive, if not resisted (PARKER, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 8, 1911, in favor of the defendants, upon motion for judgment on the pleadings. Affirmed.

Gallagher, Smith & Mack, for appellant.

John Salisbury, for respondents.

¹Reported in 120 Pac. 81.

MOUNT, J.—In this case the lower court granted a judgment in favor of the defendants upon the pleadings. The plaintiff has appealed.

The facts as they appear from the pleadings are as follows: The plaintiff is the administratrix of the estate of William J. Jolly, deceased. The defendant Catherine Walters is the mother of the plaintiff, and was the widow of William J. Jolly, deceased. She has married Chris Walters since the death of her former husband. When Mr. Jolly died, on September 27, 1907, he left as his heirs the defendant Catherine Jolly, his widow, the plaintiff Nellie Fairfax, his daughter, and Jarvis Jolly, a minor son. He left an estate consisting of both real and personal property. On August 21, 1908, Nellie Fairfax was regularly appointed administratrix of this estate. Thereafter appraisers were appointed, and the real estate was appraised at the value of \$1,800; the personal property at the value of \$430. All this property was community property of William J. Jolly, deceased, and his wife, Catherine Jolly.

After the appraisalment, the widow executed and filed a homestead declaration upon the real estate, stating that the value thereof did not exceed \$1,800, and that William J. Jolly during his lifetime had made no homestead declaration. She thereupon filed a petition in the estate, alleging the foregoing facts, and also that she and her minor son, Jarvis Jolly, were residing upon the land at the time of the death of her husband, and ever since have been residing thereon as their home; and prayed the court to set the same aside to her as her homestead. This petition was not served upon the administratrix personally. It is alleged in the answer that the petition was served upon the attorneys for the administratrix. This allegation is denied by the reply, but it is admitted that notice of the hearing upon the petition was served upon the attorneys for the administratrix. After this notice, the petition came on for hearing, and the court, on February 20, 1909, made and entered an order setting

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aside the real estate as the homestead of the widow. Thereafter, on October 18, 1910, this action was begun to set aside this order, upon the ground that no service of the petition was made upon the administratrix, and that she had no knowledge thereof until just prior to the commencement of this action; and therefore the court had no jurisdiction to make the order; and, also, upon the ground that the value of the estate at that time was \$5,000, and that the widow fraudulently alleged the value thereof at \$1,800.

The controlling question is whether the court had jurisdiction to set the estate over to the widow as a homestead. If the court had jurisdiction to do this, and the administratrix appeared in that proceeding or had such notice as imposed the duty upon her to appear and try out the question of value or the right of the court to make the order, then that order was *res adjudicata*. *In re Doane's Estate*, 64 Wash. 303, 116 Pac. 847.

The statute provides as follows:

"When a person shall die, leaving a widow, or minor child or children, the widow, child or children, shall be entitled to remain in the possession of the homestead, and of all the wearing apparel of the family, and of all the household furniture of the deceased; and if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, the widow, or the child or children, may comply with such provisions, and shall be entitled on such compliance to a homestead as now provided by law for the head of a family, and the same shall be set aside for the use of the widow, child or children, and shall be exempt from all claims for the payment of any debt, whether individual or community. Said homestead shall be for the use and support of said widow, child or children, and shall not be assets in the hands of any administrator or executor for the debts of the deceased, whether individual or community." Rem. & Bal. Code, § 1465.

"In case of the appointment of an executor or administrator upon the death of the husband, as mentioned in the last preceding section, the court shall, without cost to the

widow, minor child or children, set apart for the use of such widow, minor child or children, all the property of the estate by law exempt from execution; if the amount thus exempt be insufficient for the support of the widow and minor child or children the court shall make such further reasonable allowance out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate." Rem. & Bal. Code, § 1466.

In *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116, we said:

"In the case before us the property was the community property of the decedents. Had the husband selected a homestead therein prior to his death, or had the wife selected one subsequent to his death, the whole thereof would have vested in fee in the wife, to the exclusion of the minor appellant; . . ."

See, also, *In re Murphy's Estate*, 46 Wash. 574, 90 Pac. 916.

It is said by the appellant that the cases of *Austin v. Clifford*, 24 Wash. 172, 64 Pac. 155, referred to in the above entitled case, and *Stewin v. Thrift*, *supra*, were both overruled in the case of *In re Lloyd's Estate*, 34 Wash. 84, 74 Pac. 1061. We had no intention of overruling those cases. They were cited with approval in that case, which was a case where the homestead selection was made out of the separate property of the husband, and therefore, under the plain terms of the statute, could be set aside to the widow only for a limited time, or "until the final settlement of the estate." In this case, however, the homestead was selected from the community property, and for that reason the title vested in the widow in fee, provided the court was authorized to make the order.

It is argued that a petition for an order to set aside the homestead to the widow is an original proceeding, of such a character that personal service upon the administrator is necessary. For the purposes of this case, we must assume that no personal service was made upon the administratrix. Notice was, however, given to her attorneys. There can be

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no doubt that an attorney is not authorized to accept service of original process for his client without special authority. *Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161. But it is said in that case that, where an attorney has made a voluntary appearance in behalf of the party, the "judgment entered thereon will not be set aside except for clear and convincing proof that the attorney did not have authority to appear."

In this case, it is conceded that the attorneys upon whom notice was served were attorneys for the administratrix, "to represent her in the administration of the estate." But it is alleged "that said attorneys have no right or authority or power to appear for her in any other capacity or proceeding." We are satisfied that this was a proceeding strictly within the administration of the estate; for we have seen above, in the provisions of Rem. & Bal. Code, § 1465, when certain facts appear, it becomes the duty of the court in the administration of the estate to set aside the homestead, "for the use and support of the widow, child or children," and the homestead "shall not be assets in the hands of the administrator." The facts necessary to call forth such order are all admitted to have existed at the time it was made. The only question open then, under the admitted facts, was the value of the estate. The appraisal as made under the direction of the court and the administratrix shows the estate to have been worth less than \$2,000. If the attorneys were authorized to represent the administratrix in the administration of the estate, it is apparent that they were authorized to accept service of notice of the application to set over the homestead to the widow, and if they did not appear to resist the order, it was clearly their duty to do so, and the order made thereon became as to the administratrix final and conclusive, after the time for review thereof.

The judgment is therefore affirmed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

PARKER, J. (dissenting)—I am not able to see my way clear to concur in the view that the court could acquire jurisdiction to set aside the homestead by a mere notice of hearing given to the attorney for the administratrix, so as to render the order binding upon the administratrix; and this seems to be the only notice supporting the court's jurisdiction in this case. I therefore dissent.

[No. 9763. Department Two. January 15, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. L. W. MORAN,
Appellant.¹

APPEAL—RECORD—AFFIDAVITS. Affidavits on motion for a new trial, not made a part of the record by bill of exceptions or statement of facts, cannot be considered on appeal.

CRIMINAL LAW—TRIAL—RIGHT TO SEPARATE TRIAL—DEMAND. Under Rem. & Bal. Code, § 2161, providing that where defendants are jointly indicted, any defendant requiring it shall be separately tried, a demand for a separate trial is timely where the defendant's trial was set before his codefendant had been apprehended, and defendant demanded a separate trial as soon as it was known that there would be a joint trial.

Appeal from a judgment of the superior court for King county, Main, J., entered May 1, 1911, upon a trial and conviction of the offense of injury to property. Reversed.

Karr & Gregory and *H. G. Sutton*, for appellant.

John F. Murphy and *Hugh M. Caldwell*, for respondent.

CROW, J.—On February 15, 1911, an information was filed in the superior court of King county, charging L. W. Moran and one John Doe with a criminal offense. Upon a joint trial John Doe, whose true name was William G. Carnahan, was acquitted. L. W. Moran was convicted, and has

¹Reported in 120 Pac. 86.

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appealed from the judgment and sentence entered upon the verdict of the jury.

Appellant's only contention is that the trial court erred in refusing him a separate trial. Certain affidavits which appear in the transcript, and are mentioned in the briefs as having been presented on the hearing of the motion for a new trial, cannot be considered on this appeal, as they have not been made a part of the record by any certified bill of exceptions or statement of facts; yet the question raised by appellant is fairly presented by the record before us, exclusive of the affidavits. On February 15, 1911, the amended information was filed, but the defendant Carnahan was not apprehended until March 25, 1911. On February 16, the appellant Moran was arraigned and entered his plea of not guilty. On February 28, he was separately tried, but the jury failed to agree. The cause was thereupon set for retrial on March 15, on which date it was continued until March 31. On March 25, the defendant Carnahan was arraigned and pleaded not guilty. On March 28, the application of appellant for a separate trial was denied. On April 4, the cause was reset for a joint trial on April 17, and appellant was convicted. Section 2161, Rem. & Bal. Code, provides:

"When two or more defendants are indicted or informed against jointly, any defendant requiring it shall be tried separately."

Appellant made his demand with reasonable promptness subsequent to the arrest and arraignment of Carnahan, and after he learned the state would ask a joint trial. In *State v. Mason*, 19 Wash. 94, 52 Pac. 525, this court, commenting on § 2161, *supra*, said:

"The right to a separate trial is a valuable one, and this section of the penal code confers it upon a defendant. It does not specify when the demand shall be deemed waived. We think this right to a separate trial belongs to the defendant and he may avail himself of the right at the time

the case is assigned for trial. A severance of trial afterwards is in the discretion of the court until the jury is sworn to try the cause, subsequently to which time a several trial cannot be granted."

Respondent, relying on this language, insists that appellant's demand came too late, as it was not made until after the cause as to him had been set for trial. The language used in the *Mason* case to the effect that a defendant may avail himself of the right to a separate trial at the time the case is assigned was clearly unnecessary to a decision on the facts then presented. In any event, the statute must receive a reasonable construction. The appellant had the right to a separate trial. To hold that he should have made his application before the cause was assigned for trial, under the circumstances here presented, would nullify the statute. When the cause was first set, Carnahan had not been arrested. It was not known that a joint trial would be possible. It could not have been contemplated, and appellant did not interpose his application. Carnahan was thereafter arrested. Appellant made his application more than two weeks prior to the date on which the joint trial finally occurred, and it was not within the discretion of the trial judge to refuse his demand.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., CHADWICK, MORRIS, and ELLIS, JJ.,
concur.

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Opinion Per MORRIS, J.

[No. 10080. Department Two. January 15, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. AUGUST MAIRE,
Appellant.¹

INTOXICATING LIQUORS—LOCAL OPTION—IMPORTATION—"UNBROKEN PACKAGES." A demijohn of whiskey, drawn from a barrel by a wholesale dealer within a wet district, and brought into, and delivered to a customer in, a dry district, is an "unbroken package," within the meaning of the local option law, Rem. & Bal. Code, § 6309, which provides that the act shall not apply to deliveries of unbroken packages at residences which are not places of business or public resort, by wholesalers in their own conveyances or by common carrier.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered December 1, 1911, upon a trial and conviction of violating the local option law. Reversed.

E. C. Dailey (*Hathaway & Alston*, of counsel), for appellant.

Ralph C. Bell, for respondent.

MORRIS, J.—Appellant was convicted of a violation of the local option law of 1909, in bringing liquor into a dry unit in quantities less than an unbroken package. The admitted facts are these: Appellant is an employee of a wholesale liquor dealer at Snohomish, a wet unit, of whom a resident of Everett, a dry unit, had ordered a demijohn of intoxicating liquor. This demijohn was filled by the dealer at Snohomish from a larger receptacle then in his store, and when so filled was brought to Everett and delivered to the customer in the same condition in which it left Snohomish. Upon these facts arises the only question in the case: What is an unbroken package, within the meaning of § 18 of that act, Rem. & Bal. Code, § 6309, which provides that the act shall not apply to deliveries of unbroken packages at resi-

¹Reported in 120 Pac. 87.

dences, which are not places of business or of public resort, by wholesalers in their own conveyances or by any common carrier.

The court below held that the words "unbroken package," should be so construed as to mean the original package as put up by the manufacturer and in which the wholesaler received the liquor, and that only a delivery of such original package within a dry unit came within the exemption of the law. We do not so interpret the law. Without special reference to the cases, it has been generally held that by the words "original package," in cases involving the right to ship intoxicating liquor into a state prohibiting its sale, was meant any form of receptacle that would hold a fixed quantity with reference to safe and convenient transportation; and when so shipped, it was immaterial what the form or size of the package was, as the importer had a right to determine the quantity desired; and so long as this quantity came to him in the unbroken or original package in which it was shipped, however small the package was, it was protected as an original package. In *State ex rel. Cochran v. Winters*, 44 Kan. 723, 25 Pac. 235, 10 L. R. A. 616, it is said:

"The original package was and is the package of the importer as it existed at the time of its transportation from one state into the other."

In *Cook v. Marshall County*, 119 Iowa 384, 93 N. W. 372, 104 Am. St. 283, the court says:

"It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer."

A package put up in the usual way employed for transportation by honest dealers, and in a *bona fide* receptacle ordinarily used in shipment and not evidently put up for the purpose of evading the law of a sister state, is regarded as an original package, so long as it remains in the unbroken condition in which it existed during its transportation. 17 Am. & Eng. Ency. Law (2d ed.), 292, 294; 7 Cyc. 429.

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Applying the reasoning and principle of these various decisions to the question submitted, the answer is readily determined; and it must be held that an unbroken package is the package in the original form in which it was made by the shipper for shipment and delivery into a dry unit, providing the receptacle used is one ordinarily used by honest dealers in the same business, and is recognized commercially as such a receptacle. This means that, if four residents of a dry unit each ordered a quart of whiskey from a dealer in a wet unit, such dealer could not send a gallon cask into the dry unit and deliver a quart to each customer. Neither could a number of residents of a dry unit join together and order the dealer in the wet unit to pack a barrel with bottled beer for convenience of shipment, send it into the dry unit, and deliver to each customer the number of bottles he desired. In each of these instances, the liquor would be delivered to the customer from a broken package which, to our mind, is plainly what the law intended to prevent. To adopt the view of the lower court would be to say that the law gives the citizens in the dry unit the right to use liquor in his private home. It forbids him procuring the liquor in the dry unit, except he may accept a delivery of liquor from a wet unit; provided, if he wishes liquor that is packed by the manufacturer in barrels or other large forms of shipment, he may order and receive nothing less than a barrel, or such other large receptacle. A quart may be sufficient for his needs, but he must nevertheless buy the barrel or case to obtain the quart. Such an interpretation of the legislative intent does not appeal to us as in the interest of temperance and sobriety, which was the purpose of the law. It savors rather of the reverse, and fixes the legislative intent as encouraging the sale of liquor in large quantities rather than, as we read the law, permitting the sale in the smallest quantity desired, provided only the delivery be made in the unbroken package in which it was shipped.

It follows the appeal is well taken, and the judgment is reversed.

Crow, Chadwick, and Ellis, JJ., concur.

[No. 9883. Department One. January 15, 1912.]

JOSEPH TOUPIN, *Appellant*, v. KENT LUMBER COMPANY,
Respondent.¹

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a rigging slinger in a logging camp was guilty of contributory negligence in not getting out of danger, or in giving the wrong signal, is for the jury, where it appears that, after attaching the cable to a log to be hauled in, it is not practicable or customary for the slinger to get out of the zone of danger before giving the signal to start the engine; that, upon plaintiff's giving the signal, the front of the log, which was obscured by brush, failed to start, and the rear end began to rise, when he immediately gave the signal to stop, which was not obeyed and he was struck by the log, and it appears that the failure to stop was due to error of the foreman in stationing the signalman too near the engine; and it also appeared that he gave the signal to "start" which seemed to him to be proper, and it is doubtful whether he should have given a signal to "start slowly."

MASTER AND SERVANT—NEGLIGENCE—METHODS OF BUSINESS—SIGNALS—FELLOW SERVANTS. The failure of a signalman to transmit a signal to start a donkey engine in a logging camp does not relieve the master from liability for injuries to a rigging slinger, as being an act of a fellow servant, where the accident was not the fault of the signalman, but was due to a faulty system in stationing the signalman too near the engine.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 10, 1911, upon sustaining a challenge to the evidence, dismissing an action for personal injuries sustained by a rigging slinger in a logging camp. Reversed.

Willett & Oleson, for appellant.

Milo A. Root, for respondent.

¹Reported in 120 Pac. 100.

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Opinion Per FULLERTON, J.

FULLERTON, J.—The appellant received personal injuries while in the employment of the respondent and brought this action to recover therefor. On the trial, at the conclusion of his case in chief, a challenge to the sufficiency of his evidence was interposed and sustained and the action dismissed with prejudice. This appeal is prosecuted from the judgment of dismissal.

The evidence tended to show the following facts: The respondent was engaged in the logging business, and the appellant was one of its employees. The particular crew with which the appellant was put to work was engaged in hauling logs from the woods where they were cut, to certain skids placed alongside a logging railroad. The logs were hauled by means of a stationary donkey engine, which operated a steel cable. The cable would be stretched from the engine to a log it was desired to haul, the end of the cable fastened thereto, and the log hauled in by causing the cable to wind up on a drum attached to the engine and operated thereby. To facilitate fastening the end of the cable to the log, an instrument called a "choker" was used. It consisted of a short piece of steel cable, having a hook at one end and an eye at the other. It was the appellant's duty to hook the end of the cable onto the choker and superintend the starting of the log; in local parlance, he was called a rigging slinger. He communicated to the engineer operating the engine through a signalman. A wire, one end of which was fastened to a whistle on the engine, was stretched along the line of the cable. The signalman communicated the signals given by the rigging slinger to the engineer by manipulating this wire.

The appellant had worked for the respondent but one day prior to the day he received his injury. On that day, he assisted in putting a new cable onto the donkey engine. When he started to work the next morning, it was quite dark, and he did not see where the signalman was stationed. The haul was started some one thousand feet back from the en-

gine, the wire cable being stretched out almost its full length. The first three or four logs he hitched onto pulled out without difficulty, and he had no occasion to give a signal other than the signal to go ahead. The next log on which he hitched the cable was about 40 feet in length, and the end on which the choker was fastened was covered with brush so as to render it impossible to see what was in its immediate front. After hitching the cable onto the log, he gave the signal to go ahead, and immediately stepped away from the log at right angles thereto to a distance of twenty-five or thirty feet, where he stopped to watch the effect of the pull by the engine. As the cable tightened the log instead of pulling out as was expected began to rise at the farther end. On observing this the appellant gave the stop signal and immediately started to get out of the way of the log. The stop signal was not obeyed, and the pull on the log swung it around onto the appellant causing the injuries for which he sues.

The appellant was an experienced man at the work he undertook to perform, and testifies that he performed the work in the usual and customary manner; that it was not usual nor practicable for a rigging slinger to go beyond the zone of possible danger from a log before giving the signal to haul on the cable, as to do so would take too much time, causing not only a loss to his employer but causing the employee to "lose his job;" that there was no danger in the situation in which he stood had his signals been obeyed in the customary manner, as the log as soon as the pull on the cable ceased would drop directly to the ground; and that it was necessary moreover for the rigging slinger to be reasonably close to the log that he might see that the cable hook did not slip from the eye of the choker. His evidence further tended to show that the reason why the signalman did not catch his signal to stop was because he was stationed in the wrong place, being stationed too close to the donkey engine; that, when the engine was not in motion, signals could be

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heard anywhere along the line, but when it was put in motion the noise was such that the signalman could not hear the signals of the rigging slinger unless he was much nearer the rigging slinger than he was in the present instance. There was evidence tending to show, also, that the rigging slinger had nothing to do with stationing the signalman; that this duty was assumed by and belonged to the foreman in general charge of the work.

On cross-examination, the appellant testified that there were three signals in use between the rigging slinger and the engineer in work such as was being carried on in the present instance, the one meaning, "go ahead," the other "go ahead slowly," and the third "stop;" and the cross-examiner sought to show by the surrounding circumstances that the rigging slinger had given the wrong signal in the particular case; that he should have given the signal "go ahead slowly" instead of the signal "go ahead;" and that it was this fact that caused the appellant's injury.

The record is not entirely clear as to the ground upon which the trial judge rested his decision, but it can be gathered therefrom that he thought the appellant guilty of contributory negligence, either on the ground last suggested, or that he failed to exercise proper prudence before directing the engineer to haul away on the log. But it has seemed to us that the question whether or not the appellant was guilty of contributory negligence was for the jury. As we have said, he testified not only as to the manner in which he performed his work, but testified also as an expert that he performed it in the usual and customary manner. In this, he was supported by other witnesses who were experienced in the work the appellant was performing. If this be true, clearly the appellant was not guilty of contributory negligence unless there was something in the particular circumstances that made it necessary to act contrary to the ordinary rule; and whether or not there were such circumstances was for the jury to determine. So, also, with the question

whether the proper signal was given in the first instance. The appellant testified that he gave the signal that seemed to him proper under the circumstances, and we think the question whether or not the signal was the proper one was sufficiently doubtful to make it one for the jury rather than one for the court.

It is argued, further, that the appellant and the signalman were fellow servants, and that any fault of the signalman cannot be visited upon the master. But the evidence tended to show that the fault was rather with the signal system than with the signalman. For this, the master was responsible; and if it was faulty, either because the signalman was stationed at an improper place, or because of some defect in construction, the master is equally responsible for an injury caused to his servants thereby. *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400.

The judgment appealed from is reversed, and a new trial awarded.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

[No. 9548. Department Two. January 15, 1912.]

LAURA SNIDER *et al.*, *Appellants*, v. WASHINGTON WATER POWER COMPANY, *Respondent*.¹

TRIAL—MISCONDUCT OF ATTORNEY—IMPROPER ARGUMENT. It is improper for counsel in argument to discuss the legal effect of the answer to special interrogatories, or their legal bearing upon the general verdict.

NEW TRIAL—MISCONDUCT OF ATTORNEY—DISCRETION—ABUSE—APPEAL—REVIEW. It is not an abuse of discretion to grant a new trial for misconduct of counsel who misstated the ruling of the supreme court upon similar facts, placed before the jury the finding of the court in such case upon similar facts, improperly discussed the legal

¹Reported in 120 Pac. 88.

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effect of answers to certain findings upon special interrogatories and their legal effect upon the general verdict, where the court had a well founded doubt, from the cumulative effect of these and other indiscretions, whether a fair trial had been had.

SAME. It is not an abuse of discretion to grant a new trial for misconduct of counsel, where instructions to disregard various acts and misconduct complained of did not adequately cover some of the instances, and left one of them wholly unwarranted.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. An order granting a new trial will not be reversed on appeal unless abuse of discretion clearly appears where the order was not made on a misconception of law.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 2, 1911, upon granting a new trial, after the verdict of a jury in favor of the plaintiffs, in an action for wrongful death. Affirmed.

W. H. Plummer, for appellants.

Post, Avery & Higgins, for respondent.

ELLIS, J.—This is an appeal from an order granting a new trial on the ground of misconduct of appellants' counsel.

The appellants, the widow and minor children of Silas Snider, deceased, brought this action to recover for his death, which it is claimed was caused by the negligence of the respondent. The respondent owned and operated Natarium Park, a place of amusement near the city of Spokane. Among the contrivances for amusement, was a circular swing, operated by electricity. It consisted of a center upright pole, some seventy feet high, with cross-arms located at a point about sixty feet from the ground, extending out horizontally a distance of sixteen or eighteen feet, from the ends of which depended, by means of cables, the baskets or cars in which patrons of the amusement sat while being swung round the center pole by the circular movement of the cross-arms. At night the swing was illuminated by a liberal distribution of electric lights at various points on the apparatus.

The electricity for lighting was carried up the center pole

to certain metallic rings or bands placed about the pole at a point immediately below the cross-arms, and transmitted to the lights on the cross-arms by means of metallic brushes fastened to the cross-arms and making continuous contact with the metallic bands as the cross-arms swung around the pole. There were three of these metallic bands. When charged with electric current, the upper band carried about 116 volts, the lower band the same voltage, while the intermediate band was neutral. A person touching, at the same instant, the middle and lower, or the middle and upper bands, would thus receive a current of about 116 volts. If touching at the same instant the upper and lower bands, he would receive about 232 volts. On the pole was a metallic ladder leading to the point of attachment of the cross-arms.

The deceased was in the employ of the respondent, whether as general foreman of the park or as foreman of carpenters, the evidence is conflicting. It is claimed that he climbed the ladder in the performance of his duty to adjust the cross-arms, and inadvertently coming in contact with the metallic bands while the swing was lighted, received a shock which either killed him or caused him to fall from the ladder a distance of some sixty feet to the ground, causing his death. The negligence complained of is that the metallic bands were wholly uninsulated and unprotected in any manner, and that the deceased had no knowledge and received no warning that they were charged with electric current so as to be dangerous. The absence of insulation was apparently admitted, but there was competent evidence tending to show that deceased had knowledge of this fact, and had warning of the danger from contact with the bands. The jury found for the appellants, and assessed the damages at \$22,781. We state the facts thus fully in order that the bearing of the misconduct chiefly complained of may be appreciated.

One of the vital questions in issue was as to whether the deceased touched both or either of the charged bands; and if he did, what would be the effect of such contact? An ex-

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pert practical electrician was on the stand, and in answer to hypothetical questions, had testified that a person touching one of the charged bands and the neutral band while standing upon the metallic ladder and receiving about 110 volts would experience only a slight shock and would not be burned. That, if touching both of the charged bands and receiving about 220 volts, he would get more of a shock, but would not be burned. The witness further testified from his own experience that he himself had received a current of 600 volts at one time. That he had, in testing lights, often received as much as 110 volts, and had never experienced ill effects from it. On cross-examination, he was asked if 500 volts is not ordinarily fatal? He answered in the negative, and stated that he had known of many such cases in which no serious results ensued. Counsel for appellant then asked:

Q. Did you ever read the case of *Ohrstrom vs. Tacoma*, decided by the supreme court of Washington here just a short time ago and reported in the 57th Washington at page 122, where that court has held as a matter of law that 500 volts is ordinarily fatal to human life? A. I never knew of that. Q. Never knew anything about that. All right. Mr. Post: Let me see the case. Pass it over. Mr. Plummer: Right there, in so many words. Mr. Post: I didn't ask you to tell me about it. I just asked you to pass me the case, and I will read it myself and see what it says."

After counsel for respondent had an opportunity to examine the authority, he interposed objection, and the following took place:

"Mr. Post: I wish now, if your Honor pleases, to object to the statement made by Mr. Plummer that there was a case in the 57th Washington in which the court, as a matter of law, had held that five hundred volts of electricity was fatal. I except to it because it is not true, and I shall ask your Honor at this time, when you come to charge the jury, to charge the jury it is not true. There was a certain complaint and a certain allegation, and the court did not pass on the question of law at all. Mr. Plummer: It certainly makes the assertion in so many words. Mr. Post: All right. Sub-

mit that to the court and the court will pass upon it in all due time. Mr. Plummer: The plaintiffs except to the statement of counsel made in the presence of the jury, to the effect that it is not true that the supreme court of this state has in its opinion, in the case suggested, declared that it would take judicial notice of the fact that 500 volts was ordinarily fatal. I am excepting to the part of Mr. Post's statement where he says it is not true. The court: Both of your exceptions are in the record. I will look at this case later."

When the court had prepared his instructions for the jury, they were submitted in chambers to counsel for both sides. Among them was an instruction to disregard the statement by counsel for appellants that the supreme court had held, as a matter of law, that 500 volts of electricity would be fatal. After some discussion, the court announced his intention to so instruct, and counsel for appellants then said that he desired to announce in open court that he had been mistaken when he made the statement complained of, and had then misunderstood the decision. No response was made to this either by the court or by counsel for respondent. When court and counsel had returned to the court room, and the court was about to charge the jury, counsel for appellant arose and the following statement and exception were made and taken:

"If the court please, during the testimony when Mr. Ingersall was on the stand, I asked him if the supreme court of this state, in the case of *Ohrstrom v. Tacoma*, had not held as a matter of law, that 500 volts were usually fatal. The opinion I glanced at hurriedly at that time indicated to my mind that was the holding of the court, but I find that simply held that was the evidence in the case, and I wish to ask the court to instruct the jury to disregard the reference made by myself to that opinion, because it was simply made by myself inadvertently and not to mislead the jury. Mr. Post: I except to the statement of counsel as misconduct and undertaking to tell the jury what was the evidence in that case."

It is manifest that counsel for appellants thus placed before the jury the statement of an authoritative finding on evidence fully as damaging as the misconduct originally complained

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of. The court then gave his instructions, and among them one as follows:

"In this connection, it is my duty to instruct you that you should disregard the reference made by the attorney for the plaintiffs to the case of *Ohrstrom versus Tacoma*, a case from which he read in 57 Washington, at page 121, saying that said case held as a matter of law that 500 volts of electricity is ordinarily fatal to human life. It is my duty to inform you that said case does not so hold as a matter of law."

It will be noted that this instruction did not in any manner refer to or tend to remove any effect the statement of counsel as to the evidence in the *Ohrstrom* case may have had upon the jury.

Special interrogatories were submitted to the jury. One of them with the answer was as follows:

"Question 1. In what capacity was Silas Snider employed at the time of his death, as carpenter foreman or general foreman? Answer. Carpenter foreman."

In his closing argument to the jury counsel for appellants used the following language:

"Mr. Post told you, referring to interrogatory No. 1 that is propounded to you, 'in what capacity was Silas Snider employed at the time of his death, a carpenter foreman or a general foreman,' and you have got to write in there which one, whether he was a carpenter foreman or a general foreman. Mr. Post said it did not make much difference to him what you wrote in there, but that as a matter of fact he did assume the risk. And Mr. Post knows that he is trying to convince you by all the argument he can possibly muster, by all his ingenuity, by all his testimony, he is trying to have you put an answer in there saying that he was general foreman, because he knows it does make a difference in this case. And when that is put in there, he will contend that if he was the general foreman he cannot recover, because he assumed all the risks that there were around him, and that is why he wants it put in that way in order to escape this case on a technicality, that is all there is to it."

Thereupon the following colloquy between counsel and court occurred:

"Mr. Post: I wish to except to the statement of counsel. I take the position, if your Honor please, so as to make myself clear. Mr. Plummer: In my time— Mr. Post: (continuing)—that he has no right to tell the jury what would be the legal effect of an answer to a certain interrogatory, he has no right to discuss that question, and I take the exception to Mr. Plummer's undertaking to tell the jury what effect it would have on the general verdict by an answer to the interrogatory one way or the other. Mr. Plummer: I will put this in, that the statement is made in answer to Mr. Post to the effect that it would not make any difference legally which answer they put in there, a statement he made to this jury in his argument to them. Mr. Post: I except to that statement of counsel. I did not say anything of the kind. I said it was not for them or me to say what effect— Mr. Plummer: Is my time to be deducted from this? Mr. Post: You will have all the time you want, as far as I am concerned. The court: I think, Mr. Plummer, that Mr. Post is right in his request that you should not argue the purpose of those interrogatories. The purpose is to get at what the evidence is. Mr. Plummer: Then I ask the court to instruct the jury that they should not consider what the purpose is. I want to be clean here, to have a clean record if this case goes to the supreme court, and I ask the court to instruct the jury. Mr. Post: I except to that statement to the jury that he wants a clean record, when he gets to the supreme court, and the suggestion that it must go to the supreme court or will go to the supreme court, anything like that, and I except to that as improper, and improper conduct on the part of counsel. The court: Gentlemen of the jury, you heard generally what I said to Mr. Plummer a moment ago. You will disregard any statements made as to the purpose of the interrogatories."

While it is entirely proper in argument to discuss the evidence as bearing upon special interrogatories, and in the same connection as bearing upon the general verdict, and even to emphasize the fact that both special findings and general verdict must accord with the evidence to the end that they may stand together without inconsistency or con-

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flict, it is not proper to discuss the legal effect of the answer to special interrogatories or their legal bearing upon the general verdict. To permit such argument would, in many cases, tend to defeat the very purpose of special interrogatories and render their submission worse than useless.

"The objection to the statement in question lay in its strong, if not necessary, implication that, having reached a general verdict in favor of the plaintiff, the jurors should not approach the task of answering interrogatories with ingenuous minds, but that they should do so with the predominant purpose of making such answers as would not be out of accord with a general verdict in favor of the plaintiff." *Southern Indiana R. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589.

True, the court then instructed the jury to disregard counsel's statement as to the effect of the interrogatories; but to the lay mind it is difficult to appreciate the difference between discussion of evidence as bearing upon special questions and discussion as to their effect in law. The instruction failed to make this distinction with clearness.

A number of other instances of prejudicial conduct and argument of a more or less serious nature are pointed out, particularly inflammatory argument of counsel for appellants in his closing address to the jury. We cannot quote and review all of them without unnecessarily extending this opinion. It is probably true that no one of these things would have been sufficient ground for, or would have caused the court to grant a new trial. It is plain, however, from the court's remarks, that as the trial progressed there developed in his mind a well defined, and, we cannot doubt, a well founded fear that their cumulative effect was prejudicial to a fair and orderly trial. The court went to the gist of the matter and voiced the thought naturally suggested to any mind by a perusal of the record when, referring especially to the Ohrstrom incident, he said, "The difficulty with remarks of that kind Mr. Plummer, is that one by one those re-

marks will locate a feeling in the minds of the jury and it is impossible to eradicate that." And again the court said:

"Upon the question of conduct of counsel I also have doubt. As suggested by you, Mr. Plummer, if the conduct complained of had occurred but once or twice during the course of the trial, it must be overlooked because we cannot sometimes help the manifestations of our nature, our dispositions, but both of you know that I frequently warned you during the course of the trial and I think I said at one time that I feared you were both endangering whatever verdict might be returned. I say I am in doubt about it because I don't know just what the right of the trial judge is with reference to a verdict, whether it is right to compel the client to suffer for the acts of the attorney; and if so, how far the punishment of the client may be carried. I do not know what influence the conduct had upon the jury, and you both know it was not only the matters that Mr. Post directed my attention to but there were other matters. One of them that I recall now was the reference to an opinion of our supreme court holding as a matter of law that a certain voltage was death to human life, and of course there were many other things."

It is urged that since the court stated, "I do not know what influence the conduct had upon the jury," therefore, he could not say there was not a fair trial, and hence, it was an abuse of discretion to grant a new trial. In these words, the court merely expressed a truism. Of course, no man can say just what the effect of the misconduct was. For that very reason, the court could not say there had been a fair trial. If it had any effect, it was prejudicial.

As said in *Dillingham v. Scales*, 78 Tex. 205, 14 S. W. 566:

"The remarks of counsel excepted to were not justified or called for by anything legitimately belonging to the case. We cannot say they did not improperly prejudice the jury. We cannot say that they exercised no influence on the jury. If they exercised any, it was an improper one."

The true rule was succinctly stated by Justice Brewer in *Winter v. Sass*, 19 Kan. 556, as follows:

"All that can safely be laid down is, that whenever in the

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exercise of a sound discretion it appears to the court that the jury may have been influenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside."

See, also, *Bullard v. Boston & M. R. R.*, 64 N. H. 27, 5 Atl. 838, 10 Am. St. 367; *Huckell v. McCoy*, 38 Kan. 53, 15 Pac. 870; *Jordon v. Wallace*, 67 N. H. 175, 32 Atl. 174; *Martin v. State*, 63 Miss. 505, 56 Am. Rep. 812.

The very purpose of the law in requiring the trial judge to preside at jury trials is to insure, as far as may be, that spirit of fairness, orderly conduct, and observance of law without which the administration of justice would be a farce, to the end that a fair trial may be had. When he cannot say with any degree of certainty in his own mind, whether, on account of the conduct of counsel or for any other reason, that this end has been attained, it becomes his duty to grant a new trial. Such a situation is sufficient to invoke that discretion which the law has wisely reposed in the trial judge. Being himself a factor in the trial, he is better able to observe, and in a measure to feel, the effect of these things upon the minds of the jury than an appellate court can be. It is upon this wholesome principle that this court has said that the trial court has an inherent power to grant a new trial to the end that justice may be attained. *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175. We have held by an unbroken line of decisions that a motion for a new trial is necessarily addressed to the sound discretion of the trial court, and when the motion has been granted for insufficiency of evidence the order will not be disturbed unless the evidence is undisputed or the discretion has been clearly, and as said in one case, grossly abused.

"A motion for a new trial is addressed to the sound discretion of the court and will not be interfered with on appeal unless it is manifest that the discretion vested in the court

was grossly abused." *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907.

See, also, *Sylvester v. Olson*, *supra*; *Best v. Seattle*, 50 Wash. 533, 97 Pac. 772; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246; *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798; *Welever v. Advance Shingle Co.*, 34 Wash. 331, 75 Pac. 863; *Hughes v. Dexter Horton & Co.*, 26 Wash. 110, 66 Pac. 109; *Thomas & Co. v. Hillis*, 64 Wash. 288, 116 Pac. 854.

The same rule applies with at least equal force where a new trial is granted on account of misconduct of counsel. Indeed, the reasons for the free exercise of a wide discretion are even more potent in such a case than in case of insufficiency of evidence. In the nature of the thing, there is no other person or body to whose discretion such a question can be addressed in the first instance, while the question of sufficiency of evidence is primarily one for the jury. In reason, therefore, and by analogy to other cases of primary cognizance, the court's discretion should be a real one, and its exercise should not be disturbed except in case of clear abuse. It is a general rule applicable to all cases that an order granting a new trial will not be disturbed in the absence of a clear abuse of discretion unless the record discloses that the order was made because of a misconception of the law applicable to the case. *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176; *Holgate v. Parker*, 18 Wash. 206, 51 Pac. 368; *Walgraf v. Wilkeson Coal & Coke Co.*, 65 Wash. 464, 118 Pac. 343.

It is contended that the instructions of the court to disregard the various acts of misconduct complained of were sufficient to remove any impression they may have made upon the minds of the jurymen, and moreover that in most instances offending counsel retracted. In the two specific instances which we have quoted, however, as we have seen, the court's instructions at the time were not reasonably calculated to have that effect; and in the incident involving the *Ohrstrom* case the retraction of counsel injected a new element

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of error, namely, the statement as to what the evidence in that case showed, which was not covered by any instruction. In such a case it is no abuse of discretion to grant a new trial. *Greenfield v. Kennett*, 69 N. H. 419, 45 Atl. 233; *Mainard v. Reider*, 2 Ind. App. 115, 28 N. E. 196; *Florence Cotton & Iron Co. v. Field*, 104 Ala. 471, 16 South. 538; *Tucker v. Henniker*, 41 N. H. 317.

It is also contended that counsel for respondent was not without fault, and that he was guilty of many slurring side remarks directed toward counsel for appellants to which a response in kind was justified. It is true that the statement of facts presents a record of a week of wrangling between counsel which could hardly fail to create an atmosphere of passion and prejudice which ought never to prevail in a court of justice. The things, however, which we have pointed out and which from the court's remarks chiefly influenced him to grant a new trial are aside from these. They tended directly to place improper matter before the jury and to suggest things improper for their consideration.

On the whole record, we cannot say that the trial court abused its discretion. The order granting a new trial is affirmed.

DUNBAR, C. J., MORRIS, CHADWICK, and CROW, JJ.,
concur.

[No. 9788. Department Two. January 15, 1912.]

SEATTLE NATIONAL BANK, *Appellant*, v. RAEFFAEL ALLY
et al., *Respondents*.¹

STATUTES—TITLE AND SUBJECTS—RECORDING ACTS — MORTGAGES—
ASSIGNMENTS. The title of an act to amend a section "concerning
the recording of deeds and mortgages," is broad enough to include
a provision relating to the recording of assignments of mortgages.

RECORDS—OF MORTGAGES—SATISFACTION—ASSIGNMENT—FAILURE TO
RECORD—BONA FIDE INCUMBRANCERS. Rem. & Bal. Code, § 8800, pro-
viding for the assignment of mortgages and that, after an assign-
ment has been recorded, the assignee may satisfy it of record, author-
izes the record of assignments of mortgages, and thereunder and
under Rem. & Bal. Code, § 8781, providing that all deeds, mortgages,
and assignments of mortgages shall be recorded and shall thereafter
be valid as against *bona fide* purchasers, subsequent *bona fide* in-
cumbrancers may rely upon an unauthorized satisfaction by an
original mortgagee whose assignee had failed to record his as-
signment.

Appeal from a judgment of the superior court for King
county, Tallman, J., entered April 1, 1911, upon findings in
favor of the defendants, foreclosing and determining the
priority of mortgages on real estate. Affirmed.

Bausman & Kelleher, for appellant.

Benton Embree and *Farrell, Kane & Stratton*, for re-
spondents.

Crow, J.—This action was commenced by the Seattle Na-
tional Bank, a corporation, against Raeffael Ally, Hattie P.
Walcott, Emma L. Lichtenberg, and American Savings Bank
& Trust Company, a corporation, to foreclose a mortgage on
real estate. On May 18, 1908, the defendant Raeffael Ally,
a bachelor, executed and delivered to the defendant Hattie P.
Walcott his two promissory notes, secured by a mortgage
on real estate, in the city of Seattle. The mortgage was re-
corded on May 28, 1908. On June 5, 1908, Hattie P. Wal-

¹Reported in 120 Pac. 94.

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cott, for a valuable consideration, indorsed the notes and delivered them, with the mortgage, to plaintiff, but did not execute or deliver to it any written assignment of the mortgage. On April 28, 1909, the defendant Walcott, without the knowledge, authority, or consent of plaintiff, executed and delivered to the defendant Ally a written release of the mortgage, which release was filed for record on June 11, 1909.

On the date last mentioned, June 11, 1909, Ally executed and delivered to the defendant Lichtenberg his note for \$2,500, secured by his mortgage on the same real estate, which was recorded on the date of its execution. Theretofore, to wit, on April 27, 1909, Ally had executed and delivered to the defendant Walcott his note for \$1,350.62, secured by mortgage on the same real estate, which mortgage was filed for record on June 11, 1909. The note and mortgage last mentioned were, on June 30, 1909, and before the maturity of the note, assigned to the defendant, the American Savings Bank & Trust Company, which thereafter held the same in due course without notice and for value. The last mentioned assignment was recorded on July 2, 1909.

The trial court entered a decree of foreclosure, by which it was adjudged that the mortgages of Emma L. Lichtenberg and the American Savings Bank & Trust Company were prior liens to the lien of plaintiff's mortgage. The plaintiff has appealed.

The only question presented is whether appellant's mortgage should have been decreed a prior lien to those of respondents. There is no dispute between respondents as to their respective priorities. The appellant bank held title to its notes and mortgage by indorsement and delivery without any written or recorded assignment. Without its consent, the mortgage was released of record by Walcott, the original mortgagee, who then held the record title. No payment of appellant's notes has been made by Ally, the mortgagor, or by any other person. As against the defendant Ally, appel-

lant has not been deprived of its right to enforce its notes and mortgage lien. Respondents acquired their liens in good faith, relying on the record of the release of appellant's mortgage, which had been executed by Walcott, the original mortgagee. The release was fraudulent, but did its execution and record protect respondents in the priorities awarded them by the trial judge? Appellant claims it did not, and in support of its position contends that chapter 5, Laws of 1897, page 5, upon which respondents rely, and which requires the record of assignments of mortgages, is void under § 19, art. 2, of the constitution, by reason of the insufficiency and misleading character of its title. The title and act read as follows:

"An act to amend section 1439 of volume one of the General Statutes and Codes of the State of Washington, arranged and annotated by William Lair Hill, concerning the recording of deeds and mortgages.

"Be it enacted by the Legislature of the State of Washington:

"Section 1. That section 1439, volume one, of the General Statutes and Codes of the State of Washington, arranged and annotated by William Lair Hill, be and the same hereby is amended so as to read as follows: Section 1439. All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against *bona fide* purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world." Rem. & Bal. Code, § 8781.

Under this title, appellant insists the only theory upon which validity of the act, in so far as it applies to the record of the assignments of mortgages, can be supported is, to hold that the word "mortgages" includes "assignments of mortgages," within its meaning. Appellant further contends such a construction cannot be adopted, as this court in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, and *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742, in substance and effect held that the words "deeds and mort-

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gages" did not and cannot include assignments of mortgages.

From an examination of the cases mentioned, it becomes apparent that the sufficiency of the title of any act was not under consideration. Our holding in effect was that the exclusive use of the specific words, "deeds and mortgages," in the body of a recording act did not include other instruments not mentioned. We did not hold, nor was it intended to hold, that an exclusive use of the words, "deeds and mortgages," in the title of an act, would preclude the legislature from providing in the body of the act that assignments of mortgages shall be recorded. We were passing upon the effect of an omission of, "assignments and mortgages," from the body of the act. No reference was made to the title. Section 19 of art. 2 of the constitution must be reasonably construed. Its manifest purpose was to prohibit the enactment of any statute which contained matters not within the legitimate scope of the title, nor germane thereto.

In *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728, citing numerous authorities, we said:

"This court has often held that the title of an act, in order to comply with the constitutional provisions above quoted, need not be an index to the contents of the act; that the purpose of the title is to call attention to the subject-matter of the act so that any one reading it may know what matter is being legislated upon, and it is sufficient when it is broad enough to accomplish that purpose. For the various provisions constituting the act, the body of the act must be consulted, the title being neither expected nor required to give details."

An evident purpose of the act under consideration, as expressed in its title, is to provide for a record which shall disclose the owner of a mortgage lien. There can be no question but that the act rightfully provides for the record of an original mortgage as evidence of the lien held by the mortgagee. A written assignment of the mortgage, properly executed and acknowledged, transfers such lien to the assignee, who thereupon succeeds to all the rights, legal and

equitable, of the original mortgagee, and for all practical purposes becomes the mortgagee. The record of such an instrument of assignment is certainly cognate to the record of the mortgage itself. The substantial effect of recording the assignment is to so extend the record of ownership of the original mortgage that the assignee may and will be protected in all his rights as successor to the mortgagee. To hold that the requirement for the record of an assignment of a mortgage was not within the scope of the title, or that it is so foreign thereto as to render the act unconstitutional and void, would impose upon the legislature a limitation and restriction in the enactment of statutes not contemplated by the constitution. The statute must be sustained. The appellant failed to take or record an assignment of its mortgage, and the original mortgagee holding the record title released its lien. Respondents relying upon such recorded release, acquired their liens for value in good faith, and must be protected against appellant's claim to a prior lien.

Subsequently to the decision of this court announced in *Howard v. Shaw*, *supra*, the legislature of 1897 not only enacted the statute above considered, but also enacted chapter 23, page 23, Laws of 1897, relating to assignments and satisfaction of mortgages, the first section of which reads as follows:

"Section 1. Any person to whom any real estate or chattel mortgage is given, or the assignee of any such mortgage, may, by an instrument in writing, by him signed and acknowledged in the manner provided by law entitling mortgages to be recorded, assign the same to the person therein named as assignee, and any person to whom any such mortgage has been so assigned, may, *after the assignment has been recorded in the office of the auditor of the county wherein such mortgage is of record*, acknowledge satisfaction of the mortgage, and discharge the same of record." Rem. & Bal. Code, § 8800.

The words we have italicized clearly contemplate and authorize the record of assignments of mortgages. Respond-

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ents contend this statute, as well as chapter 5, *supra*, protects them in their claim of priority. In support of their position they cite *Gottstein v. Harrington*, 25 Wash. 508, 65 Pac. 753; *Christenson v. Raggio*, 47 Wash. 468, 92 Pac. 348, and *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506. This statute, chapter 23, and the cases cited, sustain their contention. In *Gottstein v. Harrington*, *supra*, we said:

"It is provided in the act of February 25, 1897, entitled 'an act relating to assignments and satisfaction of mortgages,' that any person to whom any real estate or chattel mortgage is given, or any person to whom any such mortgage has been assigned in the manner provided therein, and who has recorded the assignment in the office of the auditor of the county wherein such mortgage is of record, may acknowledge satisfaction of the mortgage, and discharge the same of record. Laws 1897, p. 23; Bal. Code, § 4565. It would seem from the above provision of the statute that the respondents were not legally bound to look beyond the records in the office of the county auditor for assignments of the mortgage there of record, and that they had a perfect right to presume that no such assignment had been made."

In *Christenson v. Raggio*, *supra*, we said:

"The appellant further contends that it was the duty of the respondents when they purchased the property and learned that the mortgage was unsatisfied, to have ascertained who was then the owner and holder of the note; that where a mortgage secures a negotiable promissory note, a mortgagor or subsequent parties dealing with the title are chargeable with notice that such note may have been transferred; that if they make payment without requiring its production, they do so at their peril, and that in case the note has been assigned, the payments so made afford no protection as against the assignee and holder of the note. They were purchasing the property from Averill Beavers to whom they paid its full value. They were under no obligation to ascertain who then held the note. Prior to the enactment of Bal. Code, § 4565 (P. C. § 6557), and in the absence of any act authorizing or requiring the record of an assignment of a mortgage, this court, in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, in substance announced

the doctrine for which appellant now contends. See, also, *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742. In chapter 23 of the Laws of 1897, at page 23, the legislature, however, enacted Bal. Code, § 4565, *supra*. Since then any person to whom a mortgage has been assigned has been authorized, after record of his assignment in the office of the auditor of the proper county, to acknowledge satisfaction and discharge the mortgage of record. This is exactly what the defendant MacKay did under the authority of his recorded assignment, and the respondents having ascertained that his assignment had been recorded, and that he had entered satisfaction, before they made any payment of purchase money to their vendor, they are now protected against any lien claimed by the appellant who failed to record his assignment for a period of more than five years."

So here, the respondents were not making payment to Walcott of the note and mortgage now held by appellant; but for a valuable consideration were acquiring liens upon real estate originally incumbered by appellant's mortgage. In so doing, they relied upon the recorded release executed by Walcott. Appellant insists the statute last mentioned, chapter 23, has no application to the facts in this case, and in its reply brief, says:

"A mere reading of this act makes it perfectly apparent that respondents, who claim under a satisfaction executed, not by an assignee, but by an original mortgagee, can claim nothing under it. But they seek to claim under it, and rely on an unguarded expression of the court in one case: *Gottstein v. Harrington*, 25 Wash. 509. And on two cases: *Christenson v. Raggio*, 47 Wash. 468, and *Summy v. Ramsey*, 53 Wash. 93, which only concern satisfactions executed by assignees—a class plainly covered by the statute printed above [chapter 23]."

The logical result of appellant's argument would seem to be that the mortgage could not be released by Walcott because she no longer owned the notes which it secured, and that it could only be released by an assignee who had obtained and recorded an assignment properly executed. Ap-

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pellant did not protect itself by obtaining and recording an assignment and, according to its contention, could not release the mortgage under authority of the statute last cited. Hence, the only result of its interpretation of the statute would be that as the mortgage could not be released either by Walcott or itself, it could not be released at all, so as to protect parties who in good faith might acquire subsequent liens. The language quoted from the opinions cited was not inadvertently used, but whether it was or not, it can be appropriately applied to the facts of this case.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and ELLIS, JJ., concur.

[No. 9415. *En Banc*. January 15, 1912.]

D. M. MORGAN *et al.*, *Appellants*, v. BANKERS TRUST
COMPANY, *Respondent*.¹

APPEAL—REVIEW — HARMLESS ERROR — PRESUMPTIONS. The presumption of prejudice from error in instructions on the issues presented by the pleadings is overcome by the presumption in favor of the judgment, where the evidence on which the verdict was based is not brought up on appeal (CHADWICK, GOSE, ELLIS, and MORRIS, JJ., dissenting).

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 29, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by a passenger in an elevator. Affirmed.

Hayden & Langhorne, for appellants.

Kerr & McCord and *Hudson & Holt* (*Charles Arnold*, of counsel), for respondent.

¹Reported in 119 Pac. 1116.

ON REHEARING.

PER CURIAM.—A petition for rehearing in this case having been granted, argument thereon before the court *en banc* was heard on December 28, 1911. A majority of the court being of the opinion that the judgment should be affirmed, for the reason stated in the majority opinion of department one, rendered June 8, 1911, 63 Wash. 476, 115 Pac. 1047, it is so ordered.

CHADWICK, J. (dissenting).—The dissenting opinion written by Judge Gose when this case was first decided (63 Wash. 476, 115 Pac. 1047) so clearly indicates the error of the majority that, to add another reason for a reversal of the judgment, may be considered a work of supererogation on my part. But the court has gone so far afield that, in conscience, I cannot allow this case to pass without recording a protest against what I conceive to be a misapprehension of the law, as well as a denial of the legal right of plaintiff to have the merit of her case passed upon by this court. The rules announced in the majority opinion are good rules when properly applied. Judge Parker rightly says that the exact question presented on this appeal has never been passed upon by this court; but finds support for his conclusion that the judgment of the lower court should be affirmed by reference to certain cases which, in his judgment, "by analogy, support" the majority opinion. These cases are generally correct, and were pronounced in order to do justice, not to defeat it. This case is simple, and in my opinion the opinion of the court does not touch the true issue. The majority says that,

"We are led to conclude, in the absence of evidence upon which the verdict and judgment were rendered, the presumptions in support of the judgment overcome the presumption of prejudice arising from erroneous instructions in this case, assuming for argument's sake only that the instructions complained of do not correctly state the law."

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Reference to Judge Gose's dissenting opinion will disclose the character of the instructions complained of, and the error of the majority lies in this: that they assume that the instructions are correct statements of legal propositions that might apply to some state of facts, whereas the instructions do not state legal propositions, and therefore could not apply to any conceivable state of facts. No judge on earth could sustain them on any theory of the law, or apply them to any possible condition in human affairs, without inviting the just criticism of the profession. Indeed, counsel do not seriously contend that the instructions state the law under any state of facts. Then, why have a statement of facts that will admittedly show plaintiff to have been a weak and neurasthenic woman, when the conception of the case by the trial judge was so erroneous that we would not take the trouble to read it? If appellant was in bad health, the instructions are unsound. If she was in good health at the time of the injury, the instructions are immaterial to any issue, and prejudicial. Does it require a statement of facts to demonstrate this? The rule is—I state it because the majority has not seen fit to do so:

“When the evidence is not in the record, the court will go a great way to sustain the judgment of the circuit court. If, upon any probable state of facts, the instructions complained of would be correct, the acceptance of such facts will be presumed. But if the instructions are in themselves radically wrong, under any state of facts, directing the minds of the jury to an improper basis on which to place their verdict, it would be hazardous to presume that the jury had, notwithstanding such erroneous instructions, arrived at the correct conclusion.” *Murray v. Fry*, 6 Ind. 371.

See, also, *Grantz v. Deadwood*, 20 S. D. 495, 107 N. W. 832; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Galveston H. & S. R. Co. v. Perkins* (Tex. Civ. App.), 78 S. W. 1067; *Rapp v. Kester*, 125 Ind. 79, 25 N. E. 141; *Lindley v. Dempsey*, 45 Ind. 246; *Evans v. Gallantine*, 57 Ind.

367; *Terry v. Shively*, 64 Ind. 106; *Willis v. State*, 27 Neb. 98, 42 N. W. 920; *Godfrey v. Hutchinson Wholesale Grocer Co.*, 12 Okl. 459, 71 Pac. 627.

The judgment of the lower court should be reversed, and this case remanded for a new trial.

GOSE, ELLIS, and MORRIS, JJ., concur with CHADWICK, J.

[No. 9874. Department Two. January 16, 1912.]

INTERNATIONAL DEVELOPMENT COMPANY, *Respondent*, v.
W. R. CLEMANS *et al.*, *Appellants*.¹

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—CAUSES ARISING SUBSEQUENTLY. In an action for breach of covenant against incumbrances, where the plaintiff failed to allege either an eviction or a discharge of the incumbrances, and the court instructed the jury that they could award nominal damages only, and refused leave to file a supplemental complaint showing an eviction subsequent to the commencement of the action because it was not timely made, judgment for nominal damages is *res judicata* and a bar to a subsequent action for substantial damages by reason of the eviction, where plaintiff, instead of dismissing the former action before the judgment for nominal damages, appealed therefrom to the supreme court and sought its reversal.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered July 17, 1911, upon findings in favor of the plaintiff, in an action for breach of covenants against incumbrances, after a trial to the court. Reversed.

Forney & Moore and *Samuel R. Stern*, for appellants.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for respondent, contended, among other things: The foundation principle of the doctrine of former adjudication is that the question in controversy has or could have been fully litigated in a former action; and, if not, then there

¹Reported in 120 Pac. 79.

has been no former adjudication. *Long v. Eisenbeis*, 21 Wash. 23, 56 Pac. 933; *Ward v. Joslin*, 100 Fed. 676. Where an action is prematurely brought a determination of such action is not a bar to a subsequent action brought after the right of action accrued. 2 Black, Judgments, §§ 714, 715; *Estill v. Taul*, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498; *McFarlane v. Cushman*, 21 Wis. 401; *Brackett v. People*, 115 Ill. 29, 3 N. E. 723; *Tracy v. Merrill*, 103 Mass. 280. There can be no adjudication on the merits in an action prematurely brought, since a cause of action did not at such time exist which could be litigated and determined. 2 Sneed 546; *New England Bank v. Lewis*, 8 Pick. 113; *Hurst v. Means*, 34 Tenn. 546; *Gray v. Dougherty*, 25 Cal. 266; *Bacon v. Schepflin*, 185 Ill. 122, 56 N. E. 1123; *Timmons v. Turner*, 55 S. C. 490, 33 S. E. 571. An adjudication on a cause of action which has already accrued is not an adjudication as to other matters on which a cause of action has not accrued. *Rivers v. Rivers*, 65 Iowa 568, 22 N. W. 679; *Oleson v. Merrihew*, 45 Wis. 397; *Nevills v. Shortridge*, 146 Cal. 277, 79 Pac. 972; *Moloney v. Nelson*, 158 N. Y. 351, 53 N. E. 31; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335. No bar exists as to matters which a court has refused to pass upon by ruling it out. 23 Cyc. 1312. There was no adjudication against respondent as to substantial damages. *International Development Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034.

DUNBAR, C. J.—The case out of which this case grew was before this court, and is reported in *International Development Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034. The statement of that case was to the effect that the action was to recover damages for breach of the covenants of warranty, contained in a certain deed executed by E. M. Sharon and wife, as grantors, in favor of the plaintiff, the International Development Company, a corporation; the allegations being that, while the deed was executed by Sharon and wife,

the Sharons held the title to the property as agents for the defendants, who were the real principals in the transaction and received the entire consideration for the conveyance. The deed contained covenants of title, and also a covenant against incumbrances, except the certain incumbrance mentioned. The complaint alleged a demand upon the defendants to satisfy and discharge the incumbrance against the property, but failed to allege either an eviction or a discharge of any of the incumbrances by the plaintiff. At the close of the testimony, the court charged the jury that, if they found in favor of the plaintiff, they should award nominal damages only. The plaintiff thereupon asked leave to file an amended or supplemental complaint, for the purpose of showing that a judgment of foreclosure had been entered, that the property had been sold on execution, that it had been dispossessed of the property, and that the purchaser had entered into the possession thereof. Leave to file the amended or supplemental complaint was denied, and the jury returned a verdict in favor of the plaintiff for nominal damages. From a judgment on this verdict, plaintiff appealed, and this court sustained the judgment of the lower court, holding that only nominal damages could be obtained upon the breach of the covenant; citing 18 Cyc. 177, where it is said:

"The assessment of damages is usually governed by the situation or condition of affairs existing at the time the action is brought; hence, for a recovery of loss or damages occurring thereafter plaintiff should amend or file a supplementary petition."

On the other proposition, it was held by this court that, inasmuch as the application to amend was not made until after the court had charged the jury at the close of the trial, this court could not hold that the trial court had abused its discretion. This action was afterwards brought to obtain substantial damages by reason of the fact of the violation of the warranty against incumbrances, and that

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plaintiff had been dispossessed in due course of law. Judgment was for the plaintiff.

Several assignments are made by appellants, but the first one discussed is that the plaintiff is estopped by the former adjudication. Appellants' contention in this regard must be sustained; for, while we have not been able to discover a case or an announcement from any text-writer involving exactly the state of facts involved in this case, we think it is fairly brought within the general principles of *res adjudicata*. It is against the policy of the law to encourage litigation or the trial of two cases where one would suffice. The old familiar rule was that everything is presumed to have been adjudicated under the issues in the prior action. This rule has been modified by this and many other courts, to the effect that, notwithstanding the fact that certain questions might have been tried in the former case, if it affirmatively appears that they were not tried, the doctrine of *res adjudicata* will not apply as to them. Was the question of substantial damages tried in the former case? The respondent cites many cases to sustain the rule that, where an action is prematurely brought, a determination of such action is not a bar to a subsequent action brought after the right of action accrued; and the corollary to that proposition, that an adjudication on the cause of action which has already accrued is not an adjudication as to other matters on which a cause of action has not accrued. There can be no gainsaying the correctness of these rules, but this cause of action, while it probably did not exist at the commencement of the former action, did exist before the trial of the former action. This is manifest from the fact that a motion was made for leave to amend the complaint to show this fact. Ordinarily such an amendment would be permitted, but inasmuch as the court conceived that the application was not timely, it was denied. Under such circumstances, it was the duty of the plaintiff, if it desired to protect its rights, to have its cause dismissed without prejudice, and bring its ac-

tion for the whole amount claimed to be due. But it saw fit to force this issue upon the court by demanding a finding by the court upon this question, and appealing from its judgment in that regard, thereby adjudicating that question as a matter of law in the trial court and in this court. A reference to the prior case and to the briefs filed therein shows that the alleged error of the court in this respect was one of the assignments of error which were discussed and passed upon by this court.

It was also alleged in the former case that the court erred in instructing the jury, under the issues in that case, that they could find nominal damages only, which contentions, as we have before seen, this court refused to sustain. Instead of dismissing its action, plaintiff took a chance on reversing the judgment of the local court on both the questions involved, by litigating the question in the appellate court. Its view was that it might receive a favorable decision from a court of last resort without showing any substantial damages, thereby relieving it from the necessity of bringing another action to obtain the relief which it sought to obtain in that action. It lost its venture, and must abide the result of the decision of this court, just as the defendants would have been compelled to abide the result if this court had sustained the contention of the plaintiff.

This determination renders unnecessary the discussion of any of the other assignments. The judgment will be reversed, with instructions to dismiss the action.

MORRIS, CHADWICK, and ELLIS, JJ., concur.

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Syllabus.

[No. 9673. Department Two. January 16, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. FRED L. STONE,
Appellant.¹

INDICTMENT AND INFORMATION—VERIFICATION—WAIVER OF OBJECTION. The objection that an information was not reverified after it was amended is waived where the defendant demurred to the amended information and was later arraigned and pleaded not guilty without raising the objection as to the verification until after verdict.

PROSTITUTION—PLACING FEMALE IN HOUSE—EVIDENCE—CORROBORATION—SUFFICIENCY. Upon a trial for placing a female in charge of another for the purposes of prostitution, the evidence of the prosecutrix that defendant took her to his house and introduced her to his wife and that she stayed there several weeks as a prostitute, is sufficiently corroborated, as required by Rem. & Bal. Code, § 2443, where several witnesses testified that the house was a house of prostitution conducted by the defendant and his wife.

SAME—PREVIOUS UNCHASTITY—EVIDENCE—MATERIALITY. Upon a prosecution for placing a female in charge of another for the purposes of prostitution, the previous unchastity of the prosecutrix is not material, except as affecting her credibility as a witness.

CRIMINAL LAW—APPEAL—REVIEW—WAIVER OF OBJECTION. Where the accused withdrew objections to testimony expecting the answers to be favorable, he cannot predicate error thereon.

CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR. Error in excluding a question as to whether the defendant prevented a female from leaving a house of prostitution is cured by permitting her to answer whether any one had done so.

PROSTITUTION—PLACING FEMALE IN HOUSE—ELEMENTS OF OFFENSE. Physical restraint is not an essential element of the crime of placing a female in a house of prostitution.

PROSTITUTION—PLACING FEMALE IN HOUSE—EVIDENCE—COMPETENCY. Upon a prosecution for placing a female in charge of another for the purpose of prostitution, evidence tending to show the character of the house as a house of prostitution is competent.

WITNESSES—IMPEACHMENT—CONVICTION OF WITNESS. Under Rem. & Bal. Code, 2290, it is competent to show on cross-examination that a witness for the accused had been convicted of disorderly conduct, as affecting her credibility.

¹Reported in 120 Pac. 76.

CRIMINAL LAW—EVIDENCE—REBUTTAL EVIDENCE. On rebuttal, it is competent to show facts that would have been competent on the state's case in chief, where the specific matter was first gone into and denied on cross-examination of a witness for the defense.

WITNESSES—IMPEACHMENT—COLLATERAL ISSUES—PREJUDICE. In a prosecution for placing a female in a house of prostitution, in which the defendant's wife testified as to the good character of the house, and denied on cross-examination that she had stated to a collector that she had two girls in the house, it is error to impeach her by the testimony of the collector that she had made the statement, but only after moving to another house; since it is error requiring a reversal to allow one of the witnesses for the defendant to be impeached upon a collateral matter, and by an impeaching question that did not correspond with the impeaching evidence, the matter not relating to the offense charged and being incompetent and extremely prejudicial.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered March 30, 1911, upon a trial and conviction of placing a female in the charge of another for the purposes of prostitution. Reversed.

John R. Crites, for appellant.

Frank W. Birby and *H. C. Thompson*, for respondent.

ELLIS, J.—The appellant was convicted under an information reading as follows:

"Then and there being the said defendant Fred L. Stone, at Bellingham, Whatcom county, Washington, on or about the 5th day of October, 1910, did feloniously and unlawfully place a female named Delema Le Comte in the charge of another person, his wife, Belle Stone, for immoral purposes to wit: for the purposes of prostitution, *with intent that she, the said Delema LeComte, should live a life of prostitution.*"

With the exception of the italicized words, the information was sworn to by the county attorney on March 1, 1911. A demurrer to the information was sustained on March 7, 1911. It was then amended by adding the italicized clause, but not reverified. After the jury was empaneled a second demurrer was interposed and overruled. The appellant was then arraigned and entered a plea of not guilty, the jury

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was sworn and trial had resulting in a verdict of guilty. Motions for new trial and in arrest of judgment were overruled, and judgment and sentence pronounced by the court, from which this appeal was prosecuted.

Appellant first contends that the court erred in overruling the demurrer to the amended information, and in overruling the motion in arrest of judgment. It is claimed that the failure to reverify the information was fatal, in that Rem. & Bal. Code, § 2051, requires that all informations shall be verified. Reliance is placed upon the case of *State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461, in which this court held that when an information has been amended in a material allegation it must be reverified. In that case, however, the amendment was in a vital particular and was made after a plea of not guilty and after the commencement of the trial. The defendant had no opportunity to object to the amended information or to enter any plea thereto. This is not the case here. The appellant's demurrer to the amended information raised the question of its legal sufficiency to charge the crime sought to be charged, but it did not raise any objection that it was not reverified nor was this objection raised in any other manner. The record shows that appellant was arraigned and waived a reading of the information, and without further objection pleaded "not guilty." By so doing he waived the objection now urged.

"The only object of the verification is to insure good faith in instituting the proceedings. It bears the same relation to an information in a criminal action that it does to a complaint in a civil action. It is no substantial part of either the one or the other, and we see no reason why it may not be waived without prejudice to any substantial right of the defendant, or why he should not be held to have waived any irregularity or defect therein by not objecting before pleading to the merits." *Hammond v. State*, 3 Wash. 171, 28 Pac. 334.

It is next claimed that the court erred in denying appellant's motion for an instructed verdict for the reason that there was no competent evidence corroborating that of the prosecuting witness, as required by Rem. & Bal. Code, § 2443. She testified that appellant took her to the Melrose House, of which defendant and his wife were proprietors, and introduced her to his wife; that immediately his wife and another female inmate of the house explained to her how easily she could make money and wear pretty clothes, in effect proposing to her, in defendant's presence, a life of prostitution; that defendant said "Yes, Eliza makes lots of money here, and Minnie went away with \$375;" that another man came in while defendant was present; that when she suggested that she must go home, defendant's wife said, "No you are not going home, you might as well stay here;" and sent defendant for the witness' nightgown; that while he was gone, the witness, on the urgent demand of defendant's wife, went to a room with the other man where her downfall occurred; that on defendant's return, his wife told him the girl had already made \$2 and he said, "That is good;" that thereafter, for three or four weeks while she remained at the house, she continued at different times to go to the room with men and practice sexual intercourse with them; that while there she paid \$8 a week for her room, and that during all this time appellant was there nearly every day, often in the evenings, and took his meals there, ate at the same table with the prosecuting witness, and sometimes saw men go to the room with her. This, if there was any evidence corroborating it, was amply sufficient to establish the crime charged against the appellant. The corroboration chiefly relied on was the testimony of several witnesses that the Melrose House had the reputation of being a house of prostitution. Clearly this evidence was competent for that purpose. The house was conducted by the appellant and his wife. If it was a house of prostitution he knew that fact when he took the girl there. *State v. Ilomaki*, 40 Wash.

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629, 82 Pac. 873. The evidence as to the character of the house was competent as showing his purpose in taking her there and placing her in charge of his wife. On a charge such as the one before us, the character of the house in which the female is placed and of the person in whose custody she is placed are put in issue by the statute.

In further corroboration a witness for the state testified to hearing a conversation between the prosecuting witness and another inmate of the house showing clearly the bad character of the house. This is also assigned as error. Counsel for appellant at first objected to the questions on the ground that appellant was not present when the conversation took place. The court evinced an intention to sustain the objections, but when it became apparent that the witness was reluctant to testify, the objection was withdrawn, obviously in the belief that the answers would be adverse to the state. This was a chance voluntarily taken by appellant, and he cannot now successfully predicate error upon the fact that the answers, contrary to expectation, were adverse to him. Moreover, the evidence was emphasized by appellant's cross-examination. All of this evidence was corroborative and competent. Its weight was for the jury.

On cross-examination the prosecuting witness denied having stated to a policeman that she was married, that her husband's name was Settles, and that they lived together at the Beck Hotel in Bellingham. On motion of the state to strike this, the court said that, if he considered it material, he would strike it but it was immaterial. This is assigned as error. The court, however, afterwards admitted this very matter over the state's objection and also much other evidence of the same kind. The obvious purpose of this evidence was to prove prior specific instances of unchastity. Previous chaste character is not made an issuable fact by the statute. In cases of this kind, evidence of specific instances of unchastity is therefore inadmissible. The only competent evidence of this nature is that of prior general reputation

of the prosecuting witness for unchastity, particularly as bearing upon her credibility, and the introduction of that evidence was afterwards permitted. 38 Cyc. 1482; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Workman*, ante p. 292, 119 Pac. 751.

The court sustained an objection to the question, asked on cross-examination of the prosecuting witness as to whether appellant ever kept her from going where she pleased while she was at the Melrose House. This is assigned as error. The very next question, however, was as to whether *any one* kept her from going where she pleased during that time, and the court required her to answer it over the state's objection. Manifestly, if there was any error in the exclusion of the first question it was amply cured by permitting the second. Actual physical restraint is not essential to the crime. Proof of moral restraint or persuasion is all that can be reasonably required.

On redirect examination, the court permitted the prosecuting witness to state, over appellant's objection, that the appellant's wife told her in case a policeman called and asked what she was doing there, to say that she was agent for toilet articles. While this was not in the appellant's presence it was competent as tending to show the character of the house conducted by the appellant and his wife while the witness was there. Its weight was for the jury.

On cross-examination of one of appellant's witnesses, she was compelled to admit that she had been convicted of disorderly conduct. Appellant contends that this could only be proved by the record of her conviction, citing *State v. Payne*, 6 Wash. 563, 34 Pac. 317. This was not an issue in the case but merely went to the credibility of the witness. The evidence was competent for that purpose, being expressly made so by § 38 of the criminal code of 1909. Rem. & Bal. Code, § 2290. *State v. Blaine*, 64 Wash. 122, 116 Pac. 660. The rule stated in *State v. Payne*, *supra*, is no longer applicable.

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On cross-examination, the wife of appellant was asked whether the prosecuting witness while at the Melrose House sold beer for her on commission. She denied this. On rebuttal, the state was permitted, over appellant's objection to introduce testimony of the prosecuting witness that she and another inmate of the house did sell beer on commission for appellant's wife. This is assigned as error on the ground that, if admissible at all, it was a part of the state's case in chief. It is manifest that this would have been competent evidence as a part of the prosecution in chief, as tending to show the character of the person in whose custody the appellant had placed the girl, and also the character of the house conducted by that person. While the specific matter was first gone into and denied on cross-examination, it related to a relevant and material matter on the trial, namely, the character of the woman and the character of the house kept by her, and not to a purely collateral matter. It was therefore proper to permit evidence in contradiction on rebuttal. Being material to the issue on the trial, it was not obnoxious to the rule that the cross-examining party is concluded by the answer which the witness gives to a question concerning a collateral matter. Volume 10, Ency. Plead. & Prac., pp. 295, 296, after stating the rule, continues:

"The test as to whether a matter is collateral within the meaning of the rule is this: that the cross-examining party be entitled to prove it in support of his case."

Under this test the evidence complained of was clearly admissible. *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Johnson v. State*, 22 Tex. App. 206, 2 S. W. 609.

The prosecution was permitted on cross-examination to ask appellant's wife, for the purpose of impeachment, whether she had not, sometime in November, said to a certain collector for the Home Telephone Company that she had two girls in the house (by plain inference referring to the Melrose) and other girls that she could get on short notice if

he wanted to come up. She denied this. The collector was called on rebuttal and testified that the conversation occurred in the latter part of November, and related to a house then kept by her on Champion street sometime after she had removed from the Melrose. The admission of this evidence was error. The impeaching question did not correspond with the impeaching evidence. It was not directed to the Champion street house nor to a time subsequent to the removal from the Melrose House. Moreover, had the impeaching question been sufficient, the evidence of the collector was obnoxious to the rule above stated. It would not have been admissible as a part of the state's case in chief, since it referred to a time subsequent to anything connected with the crime charged and to a different house from the Melrose. It related to a collateral matter first opened and denied on cross-examination. As said in *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357:

"No rule is better settled than the one that a cross-examining party is concluded by the answer which a witness makes to a question pertaining to a collateral matter. To such answers no contradiction is allowed, even for the purpose of impeaching the witness."

See, also, *Wharton v. Tacoma Fir Door Co.*, 58 Wash. 124, 107 Pac. 1057; *State v. McLain*, 43 Wash. 267, 86 Pac. 390; *Kirk v. Seattle Elec. Co.*, 58 Wash. 283, 108 Pac. 604, 31 L. R. A. (N. S.) 991; 10 Ency. Plead. & Prac., p. 294; *Williams v. State*, 73 Miss. 820, 19 South. 826; *Welch v. State*, 104 Ind. 347, 3 N. E. 850; *Hildeburn v. Curran*, 65 Pa. St. 59. Incompetent and extremely prejudicial evidence was thus admitted. The appellant may be guilty, but he was entitled to a fair trial under the well established rules of law.

For this error, the judgment must be reversed and the cause remanded for a new trial.

DUNBAR, C. J., MORRIS, CHADWICK, and CROW, JJ., concur.

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[No. 9726. Department Two. January 17, 1912.]

JOSEPH F. WOLPERS, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—CLAIMS—PRESENTATION—CHARTER—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7995, providing that claims for damages in tort against cities of the first class filed "in compliance with valid charter provisions," shall state the actual residence of the claimant, by street and number, has no application to claims as to which the city charter did not require any notice or demand.

SAME—CLAIMS BY SERVANT OF CITY—SAFE PLACE TO WORK. The charter of the city of Spokane providing that all claims for damages for personal injuries alleged to have been sustained by reason of the negligence of the city or any officer, agent, or servant thereof, be presented to the city council, has no application to claims arising out of the relation of master and servant and the failure of the city to furnish a servant with a safe place to work.

Appeal from a judgment of the superior court for Spokane county, Clifford, J., entered March 15, 1911, dismissing an action in tort, upon sustaining objections to the introduction of any evidence. Reversed.

Roche & Onstine, for appellant.

Cannon, Ferris, Swan & Lally and *A. M. Craven*, for respondent.

ELLIS, J.—Action by the appellant against the respondent for damages because of personal injuries sustained by the appellant while in the employ of the city as a carpenter. It is alleged that, while he was at work upon a false arch which the city had erected as a form for a concrete arch of a bridge which was in process of construction across the Spokane river, at Monroe street, in Spokane, the false arch collapsed and fell, precipitating the appellant upon the rocks in the river below, permanently injuring him. The negligence alleged was carelessness in the construction of the false arch, failure

¹Reported in 120 Pac. 113.

to provide it with guy ropes, cables, braces or supports, failure to employ competent engineers for the work, failure to examine and ascertain its lack of strength and stability, failure to furnish appellant a safe place to work, and negligently assuring him that the place was safe. The complaint alleged the presentation to the city council, and the filing with the city clerk, of a notice of claim for damages within the time and in the form and manner required by the city charter. A copy of the notice was made a part of the complaint as an exhibit. It fully conformed to the charter requirement.

At the trial, the respondent objected to the taking of any testimony upon the ground that the complaint did not state a cause of action, in that the notice of claim did not contain a statement of the residence of the claimant at the time it was filed, nor his residence for six months immediately prior to the time the claim accrued, as required by chapter 83 of the Laws of 1909. The court sustained the objection and dismissed the action.

The Charter of the city of Spokane then in force, § 220, subd. 1, omitting inapposite parts, provided as follows:

"All claims for damages for personal injuries or for injuries to property alleged to have been sustained by reason of the negligence of the city, or any officer, agent, servant or employe thereof, must be presented to the city council within one month after any such injuries shall have been received in the manner hereinafter in this section provided; . . . All claims for injuries to person or property, and all notices of such claims herein required, shall be in writing and shall state the time when and the place where such injuries were received and must also state the cause, nature and extent of the same, the amount of damage sustained thereby and the amount for which the claimant will settle the same, and must be verified by his or her affidavit, in proper form, to be true; and the refusal or omission to present such claim and give notice where notice is required, in the manner and within the time in this section required shall be taken to be, and shall be, a waiver of any and all dam-

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ages on account of such injuries and shall be a bar to any suit or action against the city to recover the same, or any part thereof."

Sections 1, 2 and 3, of chapter 83, Laws of 1909 (Rem. & Bal. Code, §§ 7995, 7996, 7997), read as follows:

"Sec. 1. That whenever a claim for damages sounding in tort against any city of the first class shall be presented to and filed with the city clerk or other proper officer of such city, in compliance with valid charter provisions of such city, such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued.

"Sec. 2. That nothing in this act shall be construed as in any wise modifying, limiting or repealing any valid provision of the charter of any such city relating to such claims for damages, but the provisions of this act shall be in addition to such charter provisions, and such claims for damages, in all other respects, shall conform to and comply with such charter provisions.

"Sec. 3. That compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claims for damages."

The first section of the act of 1909 makes it manifest that the provisions of that law, as relating to cities of the first class, have no independent force. They can only be invoked by reference to the city charter, and as applying to claims prescribed and filed "in compliance with valid charter provisions of such city." That law does not extend the requirement of notice, either as contained in any city charter or as contained in the law itself, to other persons or other torts than those contemplated by such city charter. If the charter does not require the presentation or filing of any notice of claim in a case such as here under consideration, then the law of 1909 requires none.

The appellant contends that the charter has no application to the city and its employees in their relation of master and servant; that it does not require nor contemplate the presentation or filing of any notice of claim where the injury is the result of the failure of the city to furnish its servant a reasonably safe place in which to work. This contention must be sustained. The case of *Giuricevic v. Tacoma*, 57 Wash. 329, 106 Pac. 908, 28 L. R. A. (N. S.) 533, is decisive of the question. It is true that the charter provision there involved only required the filing of a claim where the injury was caused by reason of "defects, want of repair or obstruction" of streets, highways, alleys, sidewalks or crosswalks; but it is also true that the injury there involved came within the letter of the charter provision though not within its spirit. The plaintiff there, who was an employee of the city, was injured while at work in the street by the falling of an electric light pole of the city, which had been rendered unstable by the removal of dirt around it in grading the street. While the decision is placed partly upon the ground that the injury was not the result of any "defect, want of repair or obstruction in the street as a place of travel," it is also placed positively and distinctly upon the independent ground that "the law requiring notice to the city had no application to its duty as a master to furnish its servant a reasonably safe place in which to work." This court in the *Giuricevic* case referring with approval to the case of *Kelly v. Faribault*, 95 Minn. 293, 104 Pac. 231, said:

"The court held that the law requiring notice to the city had no application to its duty as a master to furnish its servant a reasonably safe place in which to work; that the purpose of the law requiring notice was to give the municipality an opportunity to investigate and protect itself against fictitious claims. We think that, while the claim in the instant case is within the letter, it is clearly without the spirit of the charter provision. In arriving at the intent of a law it is proper to consider the mischief sought to be met.

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Clearly the purpose of the notice is to enable the city to protect itself against spurious and fraudulent claims. In this case the reason for the notice is absent, for it must be presumed that the city had notice of the injury to its servant."

The language which we have quoted is palpably applicable, and with equal force, to the facts and the charter provision in the case before us as it was to the facts and the charter provision there discussed. The greater breadth of the charter requirement here involved can make no possible difference. In any case, the intent of the provision must be determined by a consideration of "the mischief sought to be met." It is as true of the Spokane charter as it was of the Tacoma charter, that "the purpose of the notice is to enable the city to protect itself against spurious and fraudulent claims." It is also obvious that the reason for the notice, in case of injury to a servant of the city while in the line of his employment, is as absent in the one case as in the other, "for it must be presumed that the city had notice of the injury to its servant." As said in the *Giuricevic* case, *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, is distinguishable. In that case the relation of master and servant was not involved.

The notice discussed in the case of *Kelly v. Faribault*, *supra*, was a notice required by statute, not by a charter provision. The statute of Minnesota, referred to in the opinion, required notice to the city of injury by reason of any defect "in a street, road, bridge, or other public place, or by reason of the negligence of its officers, agents, or servants." Revised Laws of Minnesota, 1905, § 768. The words which we have italicized are as comprehensive as those of the charter of Spokane. They are broad enough to include all claims for tort by negligence of officers or agents of the city. The court, in construing this statute in that case, said:

"The provisions of this statute relate to a defective bridge, street, public works, or places therein enumerated; and we

think it very clear, from the history of the law requiring notice to municipalities of injuries thereon, and its subsequent development, that it never was intended to apply to the relations between master and servants when the latter are injured by reason of failure of the former to provide a reasonably safe place for the servant to work, or as to any absolute duties which are enjoined by law upon the employer. The object of the notice when required is well understood to be to give the municipality an opportunity to investigate, and to protect against fictitious claims. The reason for the rule hardly applies in a case where its own servants are injured in such work by the negligence of the master, but specifically to cases where the public are interested in using within their rights the property of the city."

It is insisted as a distinction that the requirement of a statement of the claimant's residence was superadded to the charter requirements by statute after the decision in the *Giuricevic* case, and is mandatory. This is true but immaterial. The statute is mandatory, but only as to cases within its purview. As we have seen, only such notices as are required by a valid charter provision fall within the purview of the statute. The second section of the act makes this plain. The decision in the *Giuricevic* case obviously would have been the same had the statute then been in force because the charter, as there held, did not require any notice where the relation of master and servant existed.

The judgment of dismissal is reversed, and the cause remanded for reinstatement and a new trial.

DUNBAR, C. J., CROW, and CHADWICK, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 9761. Department One. January 17, 1912.]

THE STATE OF WASHINGTON, *on the Relation of*
Charles P. Curtiss, Respondent, v. C. J. ERICKSON
*et al., Appellants.*¹

CONTEMPT—DISOBEDIENCE OF ORDER OF COURT—NOTICE OF ORDER. An injunction being, under Rem. & Bal. Code, § 729, binding from the time the party is informed thereof, a defendant contractor is chargeable with notice of an injunctional order from the time of oral announcement thereof in open court, and is guilty of contempt if his employees disobey the order prior to the formal entry.

SAME—REVIEW—EVIDENCE—SUFFICIENCY. A judgment for contempt in the violation of an injunction will not be disturbed on appeal unless the evidence shows beyond a doubt that the party was not guilty of contumacious conduct.

SAME—SENTENCE—AMOUNT OF FINE—STATUTES. Under Rem. & Bal. Code, § 1050, the court has no jurisdiction to assess a fine in excess of \$100 for the violation of an injunctional order, where the right or remedy of the adverse party has not been prejudiced or affected.

SAME—JURISDICTION—EFFECT OF OTHER REMEDIES. The violation by defendant of an injunctional order, issued *pendente lite*, with jurisdiction, is contempt, although the court finally decides that the plaintiffs are without remedy.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered January 24, 1911, convicting the defendants of contempt of court, after a hearing on the merits. Modified.

Shank & Smith, for appellants.

Thomas A. Meade (*P. C. Sullivan*, of counsel), for respondent.

CHADWICK, J.—C. J. Erickson, a general contractor, had the contract for excavating a part of the Lake Washington canal. Carlson was a foreman who had charge of a part of the work. On October 22, 1910, the case of *Bilger v.*

¹Reported in 120 Pac. 104.

State, 68 Wash. 457, 116 Pac. 19, was pending in the superior court of Thurston county; and upon that day, the matter coming on for hearing upon the application of the plaintiffs for an order enjoining defendants from removing the embankment between the excavated portion of the canal and Lake Washington, the court, being satisfied that such removal might tend to lower the waters of the lake to the detriment and damage of the plaintiffs, announced that a restraining order would issue. On October 28, a formal order reciting the presence of the parties and the oral announcement of the court, made on October 22, that it would grant unto plaintiffs the relief prayed for, was entered. In this order we find the following:

"And it having this day been brought to the attention of the court that since the announcement of the decision of this court in this cause, and on or about four o'clock p. m. of October 26, 1910, some person or persons, by the use of dynamite or other explosive, tore the bottom of the ditch of excavation so as to lower the bottom thereof below the surface of the waters of said Lake Washington, and thereby turn the waters of said lake into the ditch or canal, and that such condition will probably result in inflicting damage upon the plaintiffs sought to be prevented by the decree in this cause, and it having been suggested to the court that such act was committed by some of the defendants other than state of Washington and county of King, their servants, agents, employees or representatives. Now, therefore," etc., etc.

Thereafter these appellants were brought before the court under a rule to show cause why they should not be punished for disobedience of the order of the court.

A review of the evidence offered in support of the case of the appellants would serve no purpose. It is enough to say that appellant Erickson disclaims all responsibility, saying that the contumacious act was done contrary to his advice and without his knowledge, and that it was done under the direction of the United States engineers who had charge of the work for the government; and appellant Carlson claims

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to have acted under the direction of the same engineers and further that he had no knowledge of the court's order.

Erickson, as well as his agents and servants, was bound to take notice of the announcement made by the court on October 22; and having the work in charge, Erickson is to be held to a strict accountability, not only to keep his own conduct within bounds, but to see to it that his servants and agents did not violate any order of the court. If the rule were otherwise, it would be possible, as it may have been in this case, for the party defendant to step aside, and although seemingly protesting, make his men and means subject to the orders of a stranger to the proceeding, and thus defeat the will of the court.

We have not overlooked the contention of appellants that an order of the court is not effective until formally entered by the clerk, citing *State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641; but that, and other cases which might be cited, all go to the time when the right of appeal or other right begins or ends, or where it is contended that the court has announced one decision and the judgment as entered by the clerk recites another. The rule has never, so far as we are informed, been entertained as a defense in a contempt case where there is no conflict or question as to the order of the court. An order of injunction is binding from the time the party is informed thereof, and not, as in the case of affirmative orders, from the time of service. Rem. & Bal. Code, § 729; 22 Cyc. 1013, 1014. If it were not so, it would be possible always to defeat the order of the court by performing the proscribed act while the formal order of the court was in process of preparation.

We are not disposed to question the order of the trial court in cases of this character, and will not do so unless the evidence is such as to convince us beyond doubt that the parties charged are not guilty of contumacious conduct, or it is plain that the law has not been violated. The court

imposed a fine of \$300 and imprisonment for sixty days upon appellant Erickson, and a fine of \$100 upon appellant Carlson. This sentence is erroneous in so far as Erickson is concerned. The testimony shows that the waters of Lake Washington were not appreciably lowered by blasting out the embankment, and it does not appear that any right or remedy of Bilger and his coplaintiffs was defeated or prejudiced. Rem. & Bal. Code, § 1050. Under this section, the court had no jurisdiction to assess a fine in excess of the sum of \$100.

The further point is made that, under the final decision of the *Bilger* suit (63 Wash. 457), no right of the plaintiffs in that case was interfered with, and hence the court had no jurisdiction to punish for contempt; the loss of or interference with a right or remedy is only material, or to be considered, in fixing punishment. It is enough that the court was exercising jurisdiction to hear and determine the case then before it, and defendants were guilty of "disobedience of . . . lawful order . . . of the court." The mere fact that this court held Bilger and his coplaintiffs to be without present remedy does not rob the superior court of its power to enforce its orders issued *pendente lite*, in a case where it has jurisdiction of the parties as well as of the subject-matter.

The judgment is affirmed as to the defendant Carlson, and the cause remanded with instructions to the lower court to assess a fine against Erickson not exceeding the sum of \$100.

DUNBAR, C. J., GOSE, CROW, and PARKER, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 10052. Department One. January 17, 1912.]

CARROLL KONGSBACH *et al.*, *Appellants*, v. T. F. CASEY
et al., *Respondents*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—BONDS OF CONTRACTORS—LIABILITY OF SURETY—STATUTES—CONSTRUCTION. A contractor on public work and his surety on a bond, given pursuant to Rem. & Bal. Code, § 1161, to indemnify laborers and materialmen, are not liable for wages due to a laborer under an agreement with a subcontractor in excess of the reasonable value of the services.

PARTIES—CAPACITY TO SUE—MINORITY OF PLAINTIFF—WAIVER OF OBJECTIONS. An objection to the minority of the plaintiff is waived by answer on the merits.

INFANTS—RIGHT TO SUE—GUARDIAN AD LITEM—APPOINTMENT. The court should, at any stage of the proceedings, appoint a guardian *ad litem* for infant parties, whenever their minority is made to appear.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered March 18, 1911, upon findings in favor of the defendants, in an action upon a bond of a contractor on public works. Affirmed in part and reversed in part.

H. W. Lueders, for appellants.

CHADWICK, J.—N. C. Kongsbach took a contract from T. F. Casey, principal contractor, for the painting of a school building in the city of Tacoma, Washington. Kongsbach having failed to pay plaintiffs the amounts claimed by them to be due for wages, this action was begun against the principal contractor and his surety, under the statute, Rem. & Bal. Code, § 1161. Tony Kongsbach claims \$187 to be his due and Carroll Kongsbach demands \$105. Defendant Casey in his answer made proffer of \$149 to Tony Kongsbach, and \$80 to Carroll Kongsbach. These tenders being refused, the money was paid into the registry of the court,

¹Reported in 120 Pac. 108.

and the case proceeded to trial on the merits. The court found \$149 to be due Tony Kongsbach, and gave judgment accordingly.

It is contended that the court erred in giving judgment on the *quantum meruit*, instead of upon the contract which it is alleged these plaintiffs made with the subcontractor. We think clearly that the defendants Casey and his surety should not be bound by the contract made with the subcontractor, unless it is made to appear that the services were reasonably worth the sum demanded. They were not in privity with the claimants and are entitled to make such defenses as are available, for their liability rests entirely upon the statute. *Reid v. Berry*, 178 Mass. 260, 59 N. E. 760, and *Murphy v. Fleetford*, 30 Tex. Civ. App. 487, 70 S. W. 989, are relied on by appellants to sustain their contention. But these cases are not in point. In each of them the right of recovery was made to depend upon an express contract with the owner of the property sought to be charged. The testimony as to the amount and value of the labor performed by Tony Kongsbach is conflicting, and we are not disposed to overrule the conclusion of the trial judge that he was entitled to \$149 and no more.

It developed at the trial that Carroll Kongsbach was a minor of the age of twenty years; and upon motion of defendants, the case was dismissed as to him, although counsel for plaintiffs had moved the appointment of a guardian *ad litem* upon this fact being made to appear. In this ruling the court erred. It was held in *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966, that an objection to the minority of a party was waived by answering to the merits. See, also, *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480. The appointment of a guardian *ad litem* is a matter within the discretion of the court; and upon motion it became its duty to appoint a guardian *ad litem*, or allow the case to proceed as it had been begun. Judgments rendered for or against minors are not

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void, but voidable. No form of procedure is provided for the appointment of guardians *ad litem*. Consequently the court can, at any stage of the trial, where it appears that the justice of the case requires it, either upon motion of any of the parties or upon the request of the minor, appoint a suitable person to act for him. *Nicholson v. Wilborn*, 13 Ga. 467; *Smith v. Minor*, 1 N. J. L. 477; *In re Sanborn's Estate*, 109 Mich. 191, 67 N. W. 128.

For this the cause will be reversed as to Carroll Kongsbach, and remanded with instructions to grant the motion of appellants for the appointment of a guardian *ad litem*, and to allow the case to proceed to judgment. The judgment is affirmed as to Tony Kongsbach.

DUNBAR, C. J., GOSE, CROW, and PARKER, JJ., concur.

[No. 9697. Department Two. January 18, 1912.]

EVA J. HUNT *et al.*, *Respondents*, v. PANHANDLE LUMBER COMPANY, LIMITED, *Appellant*.¹

LOGS AND LOGGING—LABORER'S LIENS—SERVICES OF TEAM—STATUTES. Under Rem. & Bal. Code, § 1162, the owner of teams has a lien for their services in getting out logs without the rendition of any personal services by him.

APPEAL—EXCEPTIONS—REVIEW—FINDINGS—PRESUMPTIONS. Findings not excepted to will be presumed to be supported by the evidence.

BILLS AND NOTES—CHECKS—PRESENTATION—WANT OF DILIGENCE—EXCUSE FOR FAILURE TO PRESENT. Failure to present checks is not excused because it was difficult and inconvenient to leave camp and present the checks in person, where the checks could have been presented in due course of mail, and would have been paid if so presented.

LOGS AND LOGGING—LABORER'S LIENS—DEFENSES—PAYMENT. Loggers' liens cannot be enforced against innocent third parties by laborers who were given checks for the amount of their claims, which,

¹Reported in 120 Pac. 538.

through their negligence and laches, were not presented until after the funds in bank for their payment had been withdrawn by the absconding contractor.

EQUITY—MAXIMS—LOSS BY INNOCENT PARTY. The maxim that where one of two innocent parties must suffer a loss by the act of a third person, the loss must fall upon the one whose act made the loss possible, applies as between a person claiming a lien on logs, who neglected to cash his check, and an innocent holder of the logs.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered February 25, 1911, upon findings in favor of the plaintiff, in an action to establish loggers' liens, after a trial to the court. Modified.

Charles L. Heitman and Graves, Kizer & Graves, for appellant.

L. J. Birdseye, for respondents.

MORRIS, J.—Appeal from a decree establishing loggers' liens in favor of respondents. The court below made findings of fact, to which appellant took due exceptions. These findings are not printed in the brief, as provided for by the rules of this court, appellant giving as its reason for not doing so that it desires to raise questions of law only. These findings not being printed nor exceptions to them urged as error, we shall confine our review of the case to questions of law only.

The first error urged is that Mrs. Hunt is estopped from asserting any lien by reason of her general conduct in connection with the business affairs of the logging operations. It would require too much space to set forth all the facts under which this estoppel is claimed by appellant and denied by Mrs. Hunt. It is sufficient to say we can find no estoppel in the matters complained of. Mrs. Hunt's claim was partly for services as cook in the camp, and partly for the hire of two teams of horses owned by her.

Appellant's second claim of error is that no lien will lie for the services of the teams, as no personal service was

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rendered by Mrs. Hunt in connection with the teams, and that our law does not provide a lien for the mere hire of teams to a logger. Our statute, Rem. & Bal. Code, § 1162, disposes of this error in expressly providing that the owner of any team which shall haul or assist in hauling any saw-logs shall have a lien upon such logs for the services of the team in hauling the same. Appellant cites many cases from states having no such statute, to the effect that the lien is only extended to such instrumentalities as the claimant makes personal use of in his work. However that may be, in jurisdictions where no lien is allowed by statute for the haul of the team, it is hardly a debatable question under our statute, and its citation is all that is necessary to rule against appellant's claim of error in this connection. One of these teams was hired by the day; the other was to be paid for at the rate of twenty-five cents per thousand feet for all logs handled by it.

It is next claimed that there is no competent evidence to establish the amount Mrs. Hunt is entitled to receive for the team working by the thousand. The findings are quite full upon this point, and as no exception is urged to them, we will assume there was competent evidence to establish the amount as found by the court.

The next error urges an estoppel on these facts: Mrs. Hunt received a check for \$250 on January 29, 1910, from Wray, who was the logging contractor doing the work for appellant. This check was not presented at the bank for payment until March 10, when payment was refused for want of funds, Wray having decamped and exhausted his credit at the bank some time during the last week in February. Had this check been presented at the bank, it would have been paid at any time previous to the 25th of February.

The same situation is shown in Kunkleman's case. He received four checks, which were not presented, in dates and amounts as follows: January 24, \$50; February 10, \$65; February 15, \$20; February 26, \$135. All of these checks

except the last one would have been paid on presentation. The only excuse given is that it was difficult and inconvenient to leave the camp to present the checks in person. We do not understand, accepting the situation upon which the plea of inconvenience and difficulty is based, why the checks could not have been presented in the due course of mail. As between the maker and the payees of these checks, it would make no difference; but where, as in this case, the rights of an innocent third party intervenes, we cannot escape the conclusion that these claimants must be charged with their own laches in failing to obtain the payment of these checks. The lien statute is an equitable one, to protect laborers in their hire. It would be far from equitable to make such use of it as to enable laborers to collect their wages with added costs from the owners of the logs, when the logger primarily liable for this hire had given them the means of payment which they refuse and neglect to take advantage of until it is too late, and then attempt to assert their claims against innocent third parties against whom they would have had no claim had they acted with due diligence. Any one who asserts an equitable claim must act fairly and proceed with diligence, or he will lose it. It was neither fairness, diligence, nor equity for these claimants to neglect to cash these checks until the maker had played out his string, and then seek to enforce what they represent against others. This would apply to all these checks except the last one to Kunkleman, given February 26. The greatest diligence on his part would have availed him nothing, as there was at no time subsequent to the date of this check sufficient money to pay it.

It is a well known equitable rule that, where one of two innocent parties must suffer a loss because of the act of a third party, the one whose act has made such loss possible must endure it. This rule is peculiarly applicable here. The act of Wray must occasion loss to either appellant or respondents. Respondents had it within their power to

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lessen their loss by cashing the checks given them by Wray. They negligently failed to do so, and their failure has made the checks worthless. They must bear the loss they have occasioned, and not thrust it upon appellant.

We find no merit in the other assignments of error as to Kunkleman's claim. In view of the failure to assert error in the findings, we are not disposed to make a critical review of the evidence to ascertain if it sustains the findings. The decree is modified so that Mrs. Hunt's lien will be reduced from \$607.75 to \$357.75, and Kunkleman's from \$363.40 to \$228.40. In all other respects, the judgment is affirmed, and the cause remanded for further proceedings as herein indicated. Appellant will recover costs in this court.

DUNBAR, C. J., CHADWICK, CROW, and ELLIS, JJ., concur.

[No. 9752. Department Two. January 19, 1912.]

MARY E. MORGAN, *Respondent*, v. FIDELITY AND DEPOSIT
COMPANY OF MARYLAND, *Appellant*.¹

SHERIFFS—FALSE RETURN—LIABILITY—DEFENSES—ESTOPPEL. A sheriff and his official bondsmen are not liable for making a false return of service whereby judgment of divorce was wrongfully obtained against a wife, where the wife, when presently informed of the divorce, did not move to set it aside, but entered into a contract for the payment of alimony referable to the decree, and only sought to hold the sheriff where after some years the husband failed to make the payments for her support.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered March 24, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon the official bond of a sheriff, after a trial on the merits. Reversed.

William W. Wilshire, for appellant.

Craven & Greene, for respondent.

¹Reported in 120 Pac. 106.

CHADWICK, J.—On November 14, 1907, George W. Morgan began an action for divorce, in King county, against the plaintiff in this suit. Summons was placed in the hands of defendant Andrew Williams, who was sheriff of Whatcom county, for service. It is alleged that no service was made, but that a false return showing personal service was filed by the sheriff, upon which a default was entered, resulting in a trial and decree in favor of George W. Morgan. The decree was entered on December 7, 1907; and by its terms Morgan was bound to pay this plaintiff \$60 per month. The court found that there was no community property. Plaintiff did not know of the divorce proceeding or its termination until some time in February, 1908. George W. Morgan afterwards remarried, and because of the contentions of plaintiff and the complications resulting from a second marriage, he entered into an agreement with this plaintiff whereby he undertook to pay her \$100 to \$150 per month, in lieu of the \$60 as provided in the decree. In aid of our statement, we will quote a part of plaintiff's testimony in this suit:

"Q. What, if any thing, was said between you and him when you made that visit down there, about his continuing to supply money to take care of the family? A. Yes, sir; he said he would continue to see that we had plenty. Q. Did he fix any amount he was going to send up to you every month? A. No, sir; not at that time. Q. Did he at any other time? A. Only in promises. Q. When was the first time he made such an arrangement with you as that? A. It was about a year after that. Q. A year after the divorce had been given? A. Yes, sir. . . . Q. What was the promise you and he made then, or what was the understanding between you and him at that time? . . . Q. About a year afterwards when he was to send up some money? A. It was about November, I think. He came up one day and told me that this woman he had married had left him and he felt very blue and he was going to contribute right along from \$100 to \$150 a month. Q. Did you enter into any written agreement with him at that time? A. No, sir. Q. Wasn't something said about making a written agreement to that effect, and wasn't there a paper drawn but not signed? Mr.

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Greene: I object as not being proper cross-examination. Q. What did you say to his proposal to send up \$100 to \$150 a month? Did you agree to that? A. You would think I would, but I do not know what I said. Q. You agreed to it? A. Yes, sir. Q. And that was when he told you that the woman had left him? A. Yes, sir. Q. And he seemed to feel bad about it—did he send up some money after that to you? A. Yes, sir; he sent money pretty regularly. Q. How much did he send at a time? A. He never would send over about \$125 in a month, but he sent that right along until he married again. Q. He got another wife? A. Yes, sir. . . . Q. Along in the spring of the year? A. Yes, sir. Q. Following that November, that promise, he sent that money? A. Yes, sir. Q. How much did he cut down your allowance after that? A. It has never been regular since that time. Q. But he has been sending it to you irregularly off and on? A. Yes, sir. Q. When did he send you the last money? A. I do not know when I have had anything direct from Mr. Morgan, but he sent a lawyer up to bring me some money some time ago. Q. When you found out this divorce had been given, did you get a copy of the judgment to see what it said or what it had in it? Did you read—it did make a provision in there for so much a month in the decree of divorce? A. I do not know. Q. You had the matter investigated to find out about the divorce? A. Yes, sir. All I knew was after I investigated. Q. You had that investigation made when you first found he was remarried in February, 1908? A. Yes, sir. Q. Then you learned what there was in those papers, your attorney investigated that for you? A. Yes, sir."

Morgan removed from the state of Washington, taking his property, if any, with him, and has since failed to punctually keep his contract, and as it is alleged neglected to provide for his family as was his custom theretofore. Upon the facts plaintiff brought this action against defendant Williams and the surety upon his official bond.

The essential allegations of plaintiff's complaint are denied, but inasmuch as the case went to a jury, we shall accept the verdict as the fact. A demurrer was filed to the complaint and overruled. The objection that the complaint does

not state a cause of action has been preserved. This order of the court is assigned as error. Considering, therefore, the demurrer and the complaint as aided and sustained by the evidence offered in behalf of plaintiff, we think clearly that plaintiff has mistaken her remedy. The decree in the divorce case was not void but voidable only. This plaintiff admits, and we will presume, that it would have been set aside upon motion and affidavit or petition if the court entering it had been applied to. This court has announced a most liberal rule in behalf of those who seek to challenge divorce decrees entered in fraud of the rights of the party defendant, or where the court has been imposed upon. *Anderson v. Burgoyme*, 60 Wash. 511, 111 Pac. 777; *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891. Plaintiff had timely notice, and instead of availing herself of the remedies which the legislature had designed for her protection, or invoking the inherent power of the court, as suggested in the *Graham* case, she seemed willing to indorse the decree, provided Morgan agreed to pay a greater amount than the court had fixed for a family allowance; and this action is maintained, not so much because no service was had in the original act, as because Morgan has left the state and refused to keep that contract.

We cannot differentiate this case from that of *Tausick v. Tausick*, 52 Wash. 301, 100 Pac. 757. In that case it was urged that no jurisdiction had been obtained over the person of the plaintiff, and a collateral action was brought to enforce property rights. We said:

"It is not quite certain whether the theory of her complaint that the court did not acquire jurisdiction and that she was coerced into signing the deed to respondent's property, or the theory that runs in and out of her testimony for its whole length that she settled with respondent and allowed him to take a divorce upon the understanding that he would do the right thing by her in the way of a property settlement and future advances which he has failed to keep is the one upon which she most relies. . . . It indicates to our

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minds that her dissatisfaction comes, not so much from the unauthorized appearance of her attorney, as from the fact that she believes her husband has not carried out his promise with reference to the settlement of money upon her after the decree was rendered. In other words, if respondent had met her demand subsequently made, the question of jurisdiction would have been admitted."

Plaintiff cannot, in a collateral proceeding, affirm the divorce decree in so far as it disposes of the marriage relation, and deny it in so far as it affects property. If the one finding is binding, the other is binding also. Good faith, as well as sound public policy, demands that erroneous and voidable judgments be set aside and modified in the courts in which they are rendered. If plaintiff desired to affirm the decree of divorce and litigate the order disposing of the property, she might have done so by either applying to the court granting it for a vacation and modification of its judgment, or by taking an appeal therefrom, if the record was in proper form to bring the facts here. She did neither, and within the logic of *Wilkinson v. Wilkinson*, 63 Wash. 126, 114 Pac. 915, and *State ex rel. Holcomb v. Yakey*, 48 Wash. 419, 93 Pac. 928, is estopped to proceed against strangers.

When plaintiff learned of the divorce, and voluntarily substituted her confidence in her recreant spouse, by entering into a contract referable to the decree, for the protecting arm of the law, she waived all right to challenge the return of the officer in any court other than the one in which the decree was rendered, or to recover damages against the surety in any collateral proceeding. The fallacy of plaintiff's position is at once apparent when we are called upon to state a rule of damages. If plaintiff were allowed to maintain this action, all that a court could say in directing the mind of the jury to the measure of damages is, that a divorce had been obtained; that no service on the defendant was had; though presently informed, defendant did not move against the de-

cree; that the court found that there was no community property; that the party charged with the payment of alimony met the requirements of the decree for a time, paying the family allowance and alimony as fixed by the court and by his subsequent contract; that finally he ceased to do so. This action has been begun and it is for you, gentlemen of the jury, to say what the judge sitting in the divorce case would or might have given in lieu of alimony or in addition to the amount he did fix, had defendant appeared and defended the action. It will require no argument to demonstrate the unsoundness of this position, and in passing, it is not out of place to say that the trial judge did not even attempt to submit a measure of damages, contenting himself with saying that the jury could find damages, if it found that plaintiff had been deprived of community property; in which event the jury might find a verdict in her favor for such sum as would compensate her for the wrongful act of the sheriff. If plaintiff desires to reopen the divorce case, she must apply to the proper court, subject, however, to the defenses that may have come by lapse of time. If she desires to sue for money which in law may be hers, she must wage an action against George W. Morgan.

The judgment of the lower court is not sustained in law, and this case is reversed with instructions to enter a judgment in favor of the defendant.

DUNBAR, C. J., CROW, MORRIS, and ELLIS, JJ., concur.

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[No. 9903. Department Two. January 23, 1912.]

IVA F. FLEMING, *Appellant*, v. J. W. STEARNS, *Respondent*.¹

TAXATION—TAX DEED—ACTION TO SET ASIDE—LIMITATIONS. An action to set aside a tax judgment title on the ground that the tax foreclosure judgment was fraudulently obtained and entered without jurisdiction, and that plaintiff did not know of the fraud until shortly before the commencement of the action, is barred, if it is not commenced within three years from the date of the deed, by Rem. & Bal. Code, § 162, requiring actions to set aside tax deeds to be commenced within such time.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 30, 1911, upon granting a nonsuit, dismissing an action to set aside a tax deed. Affirmed.

Roche & Onstine and *F. W. Girand*, for appellant.

Danson, Williams & Danson (*George D. Lantz*, of counsel), for respondent.

CROW, J.—For several years prior and subsequent to 1897, the plaintiff, Iva F. Fleming, and T. M. Fleming, her husband, who held the record title, owned certain real estate, in the city of Spokane, upon which they failed to pay taxes for the years 1897 to 1901, inclusive. On June 9, 1903, the treasurer of Spokane county issued a certificate of delinquency to the defendant J. W. Stearns. On October 26, 1903, Mr. Stearns, represented by the deputy prosecuting attorney of Spokane county, instituted a foreclosure proceeding on the certificate, and filed with the clerk of the superior court the sheriff's return of not found, and an affidavit of nonresidence of the defendants. Thereafter publication of summons was made, default and decree of foreclosure were entered, and the property was sold and conveyed to J. W. Stearns, by a tax deed executed and delivered on September 25, 1904. On July 22, 1910, Iva F. Fleming, by decree of the superior

¹Reported in 120 Pac. 522.

court of Spokane county, was divorced from her husband, T. M. Fleming, and awarded the real estate. Shortly thereafter she commenced this action against the defendant, J. W. Stearns, to vacate and set aside the foreclosure decree. The defendant pleaded the statute of limitations. On the trial, a nonsuit and order of dismissal were entered, from which the plaintiff has appealed.

The trial court held that the substantial purpose of this action was to set aside and cancel the tax deed, and that it was barred by the statute of limitations. Rem. & Bal. Code, § 162. Appellant, however, insists that the foreclosure decree and tax deed were fraudulently obtained; that she and her husband were at all times residents of the city of Spokane; that the affidavit of nonresidence was falsely and fraudulently made; that the court never obtained jurisdiction of her or her husband; that they did not appear; that she did not discover the fraud until the commencement of her action for divorce; that the defendant Stearns has at all times since the tax sale been a nonresident, and absent from the state of Washington; that personal service of summons could not be made upon him, and that the running of the statute of limitations has been tolled by his absence from the state. The trial court admitted all evidence which the appellant offered. We conclude that it was insufficient to support her allegations of fraud, or to show that respondent has been a nonresident of, or continually absent from, this state. It does show that, although he has been absent a portion of the time, in search of health and for business reasons, he has, during each summer season, been in Spokane where he could have been personally served with summons. The affidavit of nonresidence was made by the deputy prosecuting attorney, who in the discharge of his official duties was required to represent respondent in the tax foreclosure. T. M. Fleming's name appeared in the city directory as Treat M. Fleming, but it was not shown that respondent or the deputy prosecuting attorney, who made the affidavit, knew that

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T. M. Fleming and Treat M. Fleming were one and the same person. There is no evidence that either the respondent or his attorney acted in bad faith or with fraudulent intent. These findings would sustain the final judgment upon any theory of the case.

But we are clearly of the opinion that, under § 162, *supra*, the action is barred, as held by the trial judge. This, in effect, is an action to set aside and cancel a tax deed. To avoid the operation of the statute, appellant goes back of the tax deed, and attacks the judgment on which it rests, claiming fraud, want of jurisdiction, and invalidity of the decree. This she cannot do. *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082. In *Baylis v. Kerrick*, *supra*, after quoting at length from the case of *Huber v. Brown*, *supra*, we said:

"It is conceded the appellants failed to pay taxes on their land for many years prior to the commencement of this action, although they did pay taxes for 1909, before the respondents could do so. They knew the law, and must have been aware of the fact that nonpayment for such a length of time would cause a loss of their land by tax foreclosure and sale. By their present contentions they seek to avoid the effect of the statute of limitations by questioning the validity of the tax judgment. This they cannot now do. If the judgment was valid and the tax deed was regular, there would be no need of the statute, which was enacted for the manifest purpose of securing prompt action by parties wishing to set aside or cancel tax deeds."

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and ELLIS, J.J., concur.

[No. 9893. Department Two. January 23, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE W.
WORKMAN, *Appellant*.¹

ESCAPE—ELEMENTS OF OFFENSE—COMMITMENT. Where one is in custody under a judgment of conviction of a felony, the judgment is sufficient as a commitment upon which to base an information for an attempt to escape jail.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 21, 1911, upon a trial and conviction of an attempt to escape jail. Affirmed.

A. G. McBride, for appellant.

John F. Murphy, Hugh M. Caldwell, and H. B. Butler, for respondent.

PER CURIAM.—The appellant and one D. A. Hatfield were confined in the King county jail on a charge, conviction, and sentence of felony. The information which is the subject of this case is to the effect that:

"D. A. Hatfield and George W. Workman, and each of them, while then and there being so confined and held in said prison, did then and there wilfully, unlawfully, feloniously, and by force, attempt to escape from said prison;"

setting forth the manner in which the attempt was made. Conviction and judgment followed, and appeals were taken to this court from the superior court of King county.

The appeal of D. A. Hatfield was argued in this court, and a decision rendered which is reported in *State v. Hatfield*, ante p. 9, 118 Pac. 893. The main contention of the appellant in that case was that there had been no commitment, and that the judgment of the court was not sufficient upon which to base the information for an attempt to escape jail. But it was held by this court that, when a final judgment of imprisonment is rendered against a defendant,

¹Reported in 120 Pac. 522.

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that judgment becomes the only authority for such imprisonment, and the commitment, which under our law is merely a certified copy of the judgment, is only evidence of such authority. The appeal in the present case is based upon the same contention, viz., that the information does not charge a crime, in that it fails to show that, at the time of the alleged attempt to escape there was any written evidence, in the form of a warrant or commitment for appellant's imprisonment, in the possession of the sheriff of King county. A very earnest appeal and argument has been made by counsel for appellant in this case, but after an examination of the authorities and a recurrence to the opinion filed in the case of *State v. Hatfield, supra*, we are satisfied with the announcement of the law therein made.

The other assignments of error raised on this appeal seem to us to be without merit, and the judgment of the lower court is therefore affirmed.

[No. 9614. Department Two. January 23, 1912.]

O. J. EKRE, *Appellant*, v. JOHN CAIN, *Respondent*.¹

LIMITATION OF ACTIONS—CONTRACTS—GUARANTY. Where a debtor turned over a note in payment of his own debt, at the same time guaranteeing the note, the guaranty is not a promise to pay the debt of another which would be barred when the statute of limitations had run against the note; but it is a promise to pay his own debt, creating a liability during the period of limitations following its written acknowledgment.

GUARANTY—PROMISE TO PAY DEBT OF ANOTHER—CONSIDERATION. An oral guaranty of a note turned over in payment of the guarantor's indebtedness is a sufficient consideration for a subsequent written guaranty of its payment, as it is but an agreement to pay his own debt.

COMPROMISE AND SETTLEMENT—EFFECT. Where defendant was bound to pay \$7,250 for plaintiff's interest in certain lots, a second

¹Reported in 120 Pac. 523.

contract whereby plaintiff agreed to sell defendant a part, if not all, of the property, for the sum of \$4,500, was intended to discharge the first contract, and is in the nature of a compromise and settlement.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered February 7, 1911, upon findings in favor of the defendant, in an action on contract. Affirmed in part and reversed in part.

Stevenson & Sorley, for appellant.

Trumbull & Trumbull, for respondent.

CHADWICK, J.—In the year 1893, plaintiff and defendant entered into a certain contract for the sale of lots held in common and with another. By the terms of the contract, defendant was to pay plaintiff \$1,250. After the contract had run for some time, plaintiff became indebted in the further sum of \$300, making in all \$1,550. He paid \$1,000 in cash about September 8, and through the medium of one C. P. Brown, who seems to have been interested in the property and acting as a sort of an agent for both parties, plaintiff was induced to take over a note for \$340 made by the St. Louis Pressed Brick & Terra Cotta Company. This note was dated July 16, 1903, and was due January 16, 1904. It was made payable to C. P. Brown; but, as we understand, it represented a debt due from the brick company to defendant. In the correspondence between Brown and plaintiff, it is made to appear that defendant orally guaranteed to plaintiff the note. This Brown testifies to positively, and defendant will not deny that it was so. Plaintiff testifies he was induced by this representation to accept the note. The note not being paid by the brick company, Brown, who is an attorney, was instructed by plaintiff to begin action against the brick company for the recovery of the amount due on the note. It was the intention of plaintiff and of Brown to make defendant a party to the suit. Defendant was informed of this, and in order to avoid the notoriety of a lawsuit and its

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consequent influence on his personal affairs, made and delivered to Brown for plaintiff the following written guaranty:

"For value received I hereby guarantee the payment of a certain note of the St. Louis Pressed Brick & Terra Cotta Co., dated July 16th, 1903, for three hundred and forty dollars, due six months after date, with interest at eight per cent per annum, payable to the order of C. P. Brown.

"John Cain."

Action was then begun against the brick company. This action was dismissed before judgment, in consideration of a contract, signed by defendant and others in behalf of the brick company, that the title to the property owned by the brick company would be cleared and plaintiff given a second mortgage for the full amount due him on his note. The brick company thereafter became insolvent, and no part of the note was ever paid by it; nor did it or any one acting for it ever attempt to carry out the contract just mentioned. This action was brought to recover on the guaranty.

It is contended that the action is barred by the statute of limitations; for, as it is asserted, although plaintiff sues defendant within the life of the note, he has, by failing to make the brick company a party to the action, allowed the principal debt to lapse, so that there is nothing to sustain the promise of the defendant as evidenced by the written guaranty. Admitting, but not deciding, that this may under certain circumstances be the rule, it is not so here. The guaranty relied on was not a promise to pay the debt of another. It is alleged in the pleadings, and in our judgment the testimony shows, that defendant's promise was to pay his own debt, and his present liability rests upon his personal obligation, and must be held to continue during the period of limitations following its written acknowledgment. Section 3510, Rem. & Bal. Code, which is relied on by defendant, goes to the discharge of persons secondarily liable. In this case defendant is primarily liable. The note of the brick company was accepted by plaintiff, not in lieu of, but

in aid of, his oral promise to pay his then existing debt, which promise the parties have, for the want of a better term, called a guaranty.

It is contended, also, that the oral guaranty not being in any way binding on defendant, the written guaranty is without consideration. For this reason the trial judge was in the main influenced to hold against plaintiff's right of recovery. As already indicated, it will be seen that the note of the brick company was not turned over to plaintiff in payment of its own debt, but to satisfy the debt of defendant. Defendant did not engage to pay the debt of another, and the delivery of the note to his creditor was enough to support a consideration for the so-called guaranty. *Worden v. Salter*, 90 Ill. 160; *Wilson v. St. John's Hospital*, 92 Ill. App. 413; *Packer v. Wetherell*, 44 Ill. App. 95; *Gillighan v. Boardman*, 29 Me. 79.

The subsequent written acknowledgment of the debt and guaranty of its payment is enough to hold defendant to his promise; for, under and through all of the relations of the parties, the primary obligation of defendant has never been discharged. Liability for debt is a sufficient consideration for a subsequent written guaranty of its payment. 1 Brandt, *Suretyship*, § 22. It is our judgment that plaintiff was entitled to recover on his first cause of action.

For a second cause of action, plaintiff seeks to recover a balance due on the original contract of the parties. Under this contract, defendant bound himself to pay \$7,250, in consideration of which plaintiff agreed to deed his interest in certain lots to defendant or his assignee. Thereafter another contract was entered into, whereby plaintiff agreed to sell to defendant certain property, a part of which, if not all, was covered by the original contract, for the sum of \$4,500. This contract has been paid and discharged, and we agree with the trial judge that it was the intent of the parties to settle their differences, except the note above mentioned, by

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the second contract which was in the nature of a compromise agreement.

This case will be remanded with instructions to the lower court to enter a judgment for plaintiff on its first cause of action. In other respects, the judgment of the lower court is affirmed. Appellant will recover costs in this court.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9666. Department Two. January 23, 1912.]

JAMES F. MURPHY *et al.*, *Appellants*, v. CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COMPANY
et al., *Respondents*.¹

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Technically erroneous expressions in a charge to a jury are harmless, where the instructions as a whole fairly state the law.

EMINENT DOMAIN—DAMAGES—EVIDENCE—REBUTTAL EVIDENCE AS TO VALUES—ADMISSIBILITY. In an action for damages to lots by the construction of a railway trestle in the street, where evidence was admitted to show diminished value for the use to which the property was adapted, evidence is admissible in rebuttal to show that such value would be increased rather than diminished, where announcement was made that it was not introduced for the purpose of offsetting benefits against damage.

EMINENT DOMAIN—DAMAGES TO PROPERTY—TRESTLE IN STREET. Where a railway trestle crossed a street diagonally, and did not touch the street in front of one of the lots of the plaintiff, damages to such lot cannot be recovered.

TRIAL—VIEW BY JURY—INSTRUCTIONS. Upon a view of premises, it is not error to instruct that the jury knows absolutely what they see, and are to use their senses, and need not believe the testimony of witnesses if they testified to anything which the jury knows to be false.

TRIAL—INSTRUCTIONS—REQUESTS. Error cannot be predicated upon the refusal to give an instruction which was dictated to the court stenographer without calling the court's attention to the same at the time, and which was not written, marked refused, and filed

¹Reported in 120 Pac. 525.

with the clerk as part of the instructions offered by the appellant, in view of statutory requirement that the instructions shall be reduced to writing, and the rules of court requiring proposed instructions to be in writing and filed in the cause and handed to the court.

Appeal by plaintiffs from a judgment of the superior court for Pierce county, Clifford, J., entered January 21, 1911, upon the verdict of a jury rendered in favor of the plaintiffs for damages, in an action for injuries to property. Affirmed.

Sullivan & Christian, for appellants.

H. H. Field, *Geo. W. Korte*, and *H. S. Griggs*, for respondents.

MORRIS, J.—This was an action to recover damages suffered by appellants' property by reason of the construction of a trestle over and across the street upon which the lots abutted. The jury returned a verdict in favor of appellants in the sum of \$1,000. Being dissatisfied with the amount, they have appealed, assigning as error the giving of and refusal to give certain instructions, errors in the admission of testimony, and the ruling of the court in withdrawing one of the lots from the consideration of the jury.

The court gave the jury twenty instructions, twelve of which are excepted to as a whole; in addition to which thirty other errors are assigned to separate parts of such instructions, necessitating much labor in reviewing the instructions, and for that reason somewhat delaying the announcement of our decision. For this reason it will be seen that it is impracticable to here make special reference to each of these assignments. They have, however, in each instance been taken up and considered, and while, as in most cases where the court undertakes to instruct the jury at great length, sentences and phrases can be picked out that employ inapt language, and that standing alone might call for a more critical review, we are of the opinion that, upon the whole,

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the instructions correctly state the law, and no reversible error can be found in them.

"It is the settled rule of this court that, although detached statements or expressions of the court in its charge to the jury may be technically erroneous, yet if the instructions as a whole fairly state the law, there is no prejudicial error." *Cheichi v. Northern Pac. R. Co.*, ante p. 36, 118 Pac. 916.

While this was not a condemnation case, it is analogous to it, since the only question to be determined by the jury was the damage to appellants' land by reason of the extension of the railway across the street upon which the land abutted. The same principles of law in ascertaining and measuring that damage are involved, and the ultimate fact to be determined is the same. In reviewing such cases upon appeal, it has been often said, an appellate court should hesitate before finding sufficient error to disturb the verdict, and such an order will be made only when it clearly appears that the verdict is unjust and unsupported by any competent evidence. *In re Mercer Street*, 55 Wash. 116, 104 Pac. 133. This rule is primarily applicable in cases where the verdict is attacked for failure of supporting evidence, but it nevertheless illustrates the caution observed by appellate courts in reviewing cases where the only question involved is the damage to property taken or damaged for a public use. There was ample evidence to sustain this verdict, and we are not prepared to say that, because of the use of inapt language in giving instructions, the case should be sent back for a second trial.

Upon the argument, counsel for appellants called especial attention to four assignments of error. We take it these four were especially called to our attention because they were considered the most serious. We will therefore make special reference to them. The first is in the admission of testimony. Appellants called witnesses in an effort to prove these lots would be greatly damaged because of the trestle. These witnesses testified fully as to the use the lots were adapted to,

if it were not for the railway, and how that use and its value would be diminished. On cross-examination, and over appellants' objection, counsel for respondent attempted to show that this use and its value would be increased rather than diminished. Testimony of the same character was offered in support of the defense, which was likewise objected to upon the ground that respondents were attempting to offset benefits against damages. Counsel for respondents then said to the court that he was not attempting to offset damages with benefits. All he wanted to show was that the railway was not a damage to the property as affecting any particular use to which it could be put. The court then said:

"It is not competent for the purpose of showing the increase to the value of the property received by reason of any benefit, but it is competent I think to rebut your testimony and to show that this property was uninjured for business purposes because of proximity to a railroad. Mr. Korte: That is all I wish the testimony to show. It is not in violation of any constitutional provision."

Under these circumstances and with this announced purpose of the testimony and its effect as ruled by the court in the presence of the jury, we do not think it was error, as an attempt to offset benefits. There could be no question but that respondent was entitled to meet the case made by appellants, and to offer testimony showing or tending to show the damaging effects anticipated by appellants' witnesses were not probable, nor naturally to be expected because of the building of the trestle. This testimony, being proper upon this issue, could not be excluded, because it would have been competent and admissible had it been proper to prove the benefits, especially in view of the announced purpose of its admission and the court's ruling as to the proper restricted effect.

It will hardly be denied that, in determining the damage to property because of a public use, the use to which the property can be put is an element; and the damage is not

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determined by showing its use for any particular purpose, but results from a consideration of all the uses and purposes to which the property is adapted in its changed condition. A local improvement, or the building of a railroad, may utterly destroy the present use or adaptability of a piece of property; while at the same time it may so extend or enlarge that use and adaptability as not to prove a damage. Proof of such adaptability and use is therefore admissible, not to prove benefits when benefits as in this case may not be offset, but to disprove damage. *Port Townsend Southern R. Co. v. Barbare*, 46 Wash. 275, 89 Pac. 710; *San Diego Land & Town Co. v. Neale*, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604. The effect of the changed condition upon the market value of the property is the ultimate thing to be determined, and if, by reason of the change, the market value is not diminished because of some larger or more extended use and adaptability, then there is no damage for which the owner of the property is entitled to compensation. *Eachus v. Los Angeles Consol. Elec. R. Co.*, 103 Cal. 614, 37 Pac. 750, 42 Am. St. 149.

The next contention is, error in withdrawing lot 3 from the jury. Appellants' property consisted of five lots, the westerly lot being lot 3. The trestle crossed the street diagonally from southwest to northeast, but did not touch the street in front of lot 3. Under these circumstances appellants were not entitled to damages to lot 3, as it did not abut upon the right of way of the railway. This contention is controlled by *Smith v. St. Paul, Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889; *In re Fifth Avenue & Fifth Avenue South*, 62 Wash. 218, 113 Pac. 762; *Clute v. North Yakima & Valley R. Co.*, 62 Wash. 531, 114 Pac. 513.

The next assignment is in giving an instruction to the jury relative to a view of the premises which had been permitted them, and the object and purpose of this view. Among other things, the court told the jury in this instruction:

"The object of this view is to acquaint the jury with the physical situation, condition, and surroundings of the thing viewed. What the jury sees they know absolutely."

The particular complaint here is addressed to the last quoted sentence. Further on the court used this language:

"As to these matters, you must remember as part of the evidence in this case what you witnessed in viewing the premises and you have the right, and it is your duty to use your senses; and if any witness has testified to anything which you know by the evidence of your own sense on the view is false, you would not be bound to believe and indeed you could not believe the witness, and you may disregard the testimony."

This is also strongly objected to. This part of the instruction is taken from *Seattle & Montana R. Co. v. Roeder*, 80 Wash. 244, 70 Pac. 498, 94 Am. St. 864, where, in discussing a like complaint of error, it was said:

"The jury, by these instructions, are not told that they may assess the damages to the property according to their notion as obtained by a view of the premises without regard to the evidence of witnesses. Such a rule cannot obtain. But they are told that, where there is conflict in the testimony, they may resort to the evidence of their senses on the view to determine the truth, and this, we think, is correct . . . The instruction excepted to has reference to conflicting testimony, and is certainly within the rule that the jury in such cases may make use of the knowledge disclosed by the view to determine the truth."

The court then quotes from *Washburn v. Milwaukee & L. W. R. Co.*, 59 Wis. 364, 18 N. W. 328, where the court, among other expressions in defining the purpose of a view by a jury, says, "What they see they know absolutely." It, therefore, seems to us that the *Roeder* case is decisive of this contention, and the instruction, especially when read as a whole with its evident intent and meaning as the jury must have understood it, was not error. The instruction also finds support in *Seattle v. Williams*, 41 Wash. 366, 83 Pac. 242.

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The last error urged is in the refusal of the court to give the following instruction:

"You are instructed that in considering damages, if any, of plaintiffs, that they are entitled to the depreciation, if any, in value of their lots abutting upon the street where the obstruction is placed irrespective of and without regard to any benefits that may have resulted to the property from the construction of the railroad."

This request is a correct statement of the law and, if properly before the court, should have been given, unless its refusal could be placed upon other instructions already given covering the same point. Upon this point, the court has incorporated the following into the statement of facts, which is of course binding upon us:

"That at and during the argument of counsel for defendant to the jury, counsel P. C. Sullivan dictated to the shorthand reporter into the minutes of the trial the instruction set out in the statement of facts on page 246 thereof, but this was done without the court's attention being called to it; that the original notes now show and contain said instruction; that at no time was said instruction written out and offered in writing and served upon the defendant, handed to the court, or at any time marked refused or filed with the clerk of this court as a part of the offered instruction by the plaintiff. That there is no written instruction on file with the clerk of this court as contained on page 246 of said statement of facts."

Under these circumstances the failure of the court to give the instruction cannot be held error. We have held many times that the failure of the court to give proper instructions is not error unless the court was specifically requested to so charge. *Lonsdale v. Grays Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 668; *Howe v. West Seattle Land & Imp. Co.*, 21 Wash. 594, 59 Pac. 495.

These rulings are especially controlling, in view of the 1909 amendment to the trial practice act, whereby the trial judge must reduce his charge to the jury to writing, and read the same at the conclusion of the evidence and prior to

the summing up of respective counsel. It is also violative of rule 12, of the general rules of the superior court, which requires all proposed instructions to be filed in the cause and handed to the court and to opposing counsel. For these reasons this assignment of error cannot be sustained.

If additional reasons were needed, they might be found in the instructions given by the court. In instruction 4, the jury were told that the only questions in the case, "are whether the structure erected by the defendant in and across Bay street adjacent to plaintiffs' lots are an injury to the value of plaintiffs' lots and if there is any injury to what extent plaintiffs have been damaged." We do not know how the court could have used plainer language to tell the jury the only material inquiry for them was the extent, if any, of the damage to the lots. In another instruction they were told to ascertain whether or not the market value of the lots had been decreased by reason of the railroad crossing the highway diagonally in front of them, and the amount of such decrease would be the proper amount for the verdict. It is clear from the instructions given that the court told the jury to consider only the question of damages in determining their verdict; and the jury, if they understood the instructions at all, must have so understood them.

Upon a review of the whole record, and the assignments of error in connection therewith, we find none of them sustained, and the judgment is affirmed.

DUNBAR, C. J., CROW, and ELLIS, JJ., concur.

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Statement of Case.

[No. 10043. Department Two. January 23, 1912.]

SEATTLE LUMBER COMPANY, *Plaintiff and Appellant*, v.
RICHARDSON & ELMER COMPANY *et al.*, *Respondents*,
E. R. DUNN *et al.*, *Defendants and Appellants*.¹

MECHANICS' LIENS—MATERIALMEN—NOTICE TO OWNER—DUPLICATE STATEMENTS. A delivery to the contractor of duplicate statements of lumber furnished to the contractor for the construction of a house, is not a compliance with Rem. & Bal. Code, § 1133, providing for the delivery of duplicate statements to the owner; even though the court makes a general finding that the contractor was the agent of the owner in ordering the material, and in sole charge of the building; unless the evidence clearly established an agency for that purpose.

MECHANICS' LIENS—NOTICE TO OWNER—DUPLICATE STATEMENTS—TIME FOR DELIVERY. Under Rem. & Bal. Code, § 1133, requiring that duplicate statements of materials furnished must be delivered to the owner "at the time" materials are furnished, a statement August 18, of materials furnished on various days from July 30 to August 12, is insufficient to support a lien.

SAME—FAILURE TO GIVE NOTICE—ABSENCE OF OWNER—MAILING—ADDRESS. The absence of the owner from the city does not excuse a lien claimant from delivering duplicate statements of materials at the time the same are furnished, since the statute provides for service by mail; especially where the owner's resident address, where his wife was living, was given in the city directory and no attempt was made to ascertain the address or residence.

SAME—MAILING NOTICE—ADDRESS. Mailing of duplicate statements to the owner addressed to him at the place where the building was being constructed is not a compliance with the statute requiring the notices to be personally served or mailed to his last-known place of residence, where that had never been his residence, as an inspection would have disclosed, and his residence was given in the city directory.

SAME—FAILURE TO GIVE NOTICE—EXCUSES. The fact that contractors misled materialmen as to the correct address of the owner, a resident of a large city, does not excuse their failure to properly serve or mail duplicate statements to the owner at the time material is furnished.

Cross-appeals from a judgment of the superior court for King county, Tallman, J., entered June 17, 1911, upon find-

¹Reported in 120 Pac. 517.

ings in favor of certain lien claimants, in an action to foreclose mechanics' liens. Affirmed on plaintiff's appeal, and reversed on appeal of defendants Dunn.

Hastings & Stedman, for plaintiff.

Kerr & McCord, for defendants Dunn.

McClure & McClure (*J. A. McCaleb*, of counsel), for defendant Richardson & Elmer Co.

Cassius E. Gates, for defendant Fuller & Co.

MORRIS, J.—This is an appeal from the judgment in an action brought by the Seattle Lumber Company against Barnes & Hester, contractors, and Dunn and wife, as owners, in which it was sought to foreclose a lien for material used in the construction of the building upon the described premises. Richardson & Elmer Company and W. P. Fuller & Company, being lien claimants for material furnished, were made defendants. The judgment denies the right of lien to the Seattle Lumber Company, from which it appeals. The other liens are established, from which the Dunns appeal.

The only question involved in the appeals is whether duplicate statements of the material were delivered to the owner, as provided in Rem. & Bal. Code, § 1133, providing that every person furnishing material to be used in the construction of any building shall, at the time such material is delivered to the contractor, deliver or mail to the owner of the property upon or about which said material is to be used, a duplicate statement of the material so furnished; and providing further that no lien shall be filed or enforced, unless duplicate statements be so furnished. The building was being erected by Barnes & Hester for Dunn as owner, in the summer of 1909. Dunn was in the north the entire summer, and had made Mr. Kelleher, of Bausman & Kelleher, Seattle, his agent for some purpose; just to what extent, we are unable to determine. It is, however, immaterial. Dunn returned to Seattle about October 1, 1909, and paid the con-

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tractors all that was due under the contract, testifying he had no knowledge of any bills for material being unpaid, and that he had received no duplicate statements of the materials claimed to have been furnished by these three claimants. While Dunn was absent in Alaska, his wife remained in the family home, at 409, Eastlake avenue, which was the home address of Mr. Dunn, as given in the Seattle city directory, his name appearing therein as Edward R. Dunn.

The Seattle Lumber Company delivered its duplicate statements on the job to Barnes & Hester, and under a finding of the court that Barnes & Hester were the agents of Dunn in ordering materials and were in sole charge of the building and the only representative of Dunn in charge of the building, claims that the court was in error in denying its lien because of the failure to deliver duplicate statements to the owner. We do not think, in view of the court's denial of this lien, that the finding was intended to mean anything other than the ordinary agency for the purpose of ordering material and employing labor. If the court had intended to find an agency for the purpose of receiving these duplicate statements, the lien would in all probability have been sustained instead of rejected. There is no evidence to justify giving the finding such a meaning, and we agree with the lower court that this appellant was not entitled to a foreclosure of its lien, because of its failure to deliver or mail duplicate statements to the owner. Surely a delivery to the contractor, the very man against whose shortcomings the act was to protect the owner, would not be a delivery to the owner, unless the evidence clearly established an agency for such purpose.

Richardson & Elmer Company commenced furnishing material on July 30. On August 18, it mailed to E. R. Dunn, in care of Bausman & Kelleher, Alaska Building, Seattle, duplicate bills for material furnished July 30, and August 2, 3, 5, 7, 9, 11, and 12. This address was used on informa-

tion obtained from Barnes & Hester. This lien was sustained by the court, but we cannot accept this part of the decree, as it does violence to the express language of the act, and the construction placed thereon by the various decisions of this court. The act says these duplicate statements must be furnished "at the time." Such language we have held too plain for construction, and the time of the delivery of the material and that of the delivery of the duplicate statement must coincide, unless the delivery be subsequent to the amendment of 1911, when it must be done within five days. *Finlay v. Tagholm*, 60 Wash. 539, 111 Pac. 782; *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083; *Heim v. Elliott*, ante p. 361, 119 Pac. 826; *Hewitt Lea Lumber Co. v. Sandell*, ante p. 515, 119 Pac. 848.

This appellant contends that, inasmuch as Dunn was absent from the city during all the time it was delivering material, it was prevented from complying with the provisions of the statute in delivering its duplicate statements at the time of the delivery of the material, and it should be excused for such nonperformance. This contention cannot be upheld in the face of the record that Dunn's home all this time was at 409 Eastlake avenue, and that his address was so given in the city directory. The statute, in providing for a delivery of the duplicate statements by mail, covers this point and makes it imperative that the duplicate statements shall be delivered in person or sent through the mails; in which latter case mailing the statements to the last-known place of residence, as given in the city directory or ascertained from other reliable sources, would be a compliance with the law. This appellant made no attempt to ascertain Dunn's address, except from the contractors whose interest it was to mislead in case they contemplated nonpayment of these bills. The Texas cases upon which reliance is had in support of this contention are based upon a statute requiring personal service, no provision being made for service by mail as in our statute; and hence are not in point. Manifestly, if the

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owner could not be found, no personal service could be had. The right of lien in this case was therefore lost, because of a failure to mail these statements within the time fixed by the statute.

The other respondent, W. P. Fuller & Company, mailed its duplicate statements to E. R. Dunn, addressed to him at Eighth and Howell streets, Seattle. This was the location of the building that was being constructed, and this address was given this respondent by Barnes, one of the contractors. It was not the address of E. R. Dunn, and never had been, and an examination of the locality would have convinced any one of that fact, as the only buildings within this address were the building under construction and a laundry upon one of the other corners. This lien was therefore also lost, because of a noncompliance with the law. It is evident that these three materialmen permitted themselves to be misled by the contractors in suggesting these different methods, in which to deliver the duplicate statements, and that the usual methods employed in ascertaining the correct mailing address of a resident in a large city would have enabled each of these materialmen to fully comply with the requirement of this law, and preserved their liens. It was suggested on the argument that there was no indication that E. R. Dunn and Edward R. Dunn of 409 Eastlake avenue were one and the same person. Any inquiry at that address would doubtless have ascertained they were. This record presents no excuse for the failure of these materialmen to ascertain the correct address of E. R. Dunn, and mail the duplicate statements to him. The fact that the contractors did not know, or, if they did know, chose to mislead, is no justification.

For these reasons the judgment is sustained in its denial of the right of lien to the Seattle Lumber Company, and reversed in so far as it establishes the liens of Richardson & Elmer Company and W. P. Fuller & Company. Cause remanded for further proceedings in accordance herewith.

DUNBAR, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 9558. Department Two. January 23, 1912.]

MARY BURGER, as *Administratrix etc.*, Respondent, v.
TAXICAB MOTOR COMPANY, Appellant.¹

MASTER AND SERVANT—INJURY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. In an action for the death of a person run down by a taxicab, the fact that the taxicab belonged to the defendant and that the driver was in its employ as one of its regular drivers is sufficient to raise a question for the jury as to whether the driver was acting in the scope of his employment.

SAME—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. In such a case, the *prima facie* case that the driver was acting in the line of his employment is not overcome by evidence that he was on the way to his night lunch and that it was contrary to rules of the defendant to take their cars on the way to meals, especially in view of impeaching evidence that it was not contrary to rules and was customary to do so.

WITNESSES—IMPEACHING OWN WITNESS—SURPRISE. In an action for the death of a person run down by defendant's taxicab while the driver was on the way to his supper, where the plaintiff called the manager as a witness under the belief that he would testify that drivers were allowed to take their cars while going to their meals, and was surprised by his testimony that it was contrary to rules, it is competent for plaintiff to impeach the witness by the stenographer's evidence as to his testimony to the contrary given at the inquest.

MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The negligence of the driver of a taxicab that struck and killed plaintiff's decedent, is for the jury, where there was evidence that he was driving at a speed of 25 miles an hour and exceeding the speed limit, that no horn or alarm was sounded, that he might have seen the deceased when more than 100 feet distant, but he testified that he did not see him until within twenty-five feet, and that he applied both brakes, stopping the car within twenty-five feet.

SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. Whether a member of a city sewer gang, cleaning out catch basins at night, who was struck and killed by a taxicab, was guilty of contributory negligence, is for the jury, where it appears that he was at work where his duty placed him, which required him to walk slowly in a stooping position and give attention to the work in hand.

¹Reported in 120 Pac. 519.

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APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. In an action for wrongful death, it is not prejudicial error to allow the widow to testify as to the number of her children and how the deceased supported them, when it is not claimed that the damages are excessive.

MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—INSTRUCTIONS. In an action for negligent driving of an automobile in a city street, error in refusing to withdraw an issue as to whether an alarm was sounded within 30 feet of a crossing, it appearing that the street was closed, is not prejudicial, where the court instructed the jury that the evidence of failing to sound a warning could not be considered if they found that the street was not opened and traveled.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 28, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Danson & Williams and *McCarthy & Edge* (George D. Lantz, of counsel), for appellant.

Nuzum & Nuzum and *Geo. H. Armitage*, for respondent.

ELLIS, J.—Action by respondent against the appellant to recover damages for the death of respondent's intestate.

The deceased was in the employ of the city of Spokane as one of the sewer gang which worked at night flushing and cleaning out catch basins. About 10:30 o'clock on the night of May 17, 1910, while at work near the south curb of Sprague avenue, at its intersection with Spokane street, he was struck by a taxicab of the appellant in charge of its servant and received injuries which caused his death. The trial resulted in a verdict and judgment in favor of plaintiff. Defendant has appealed. At the close of the evidence, the appellant challenged its legal sufficiency to sustain any verdict for the plaintiff, and moved for an instructed verdict for defendant. The denial of the motion is assigned as error.

It is first contended that actionable negligence was not shown in that, it is claimed, the driver of the taxicab was not acting within the scope of his employment at the time

of the accident. His general employment as one of the regular drivers of the appellant was conceded. It was also conceded that the taxicab which he was driving belonged to the appellant. These things alone were sufficient to take the case to the jury on the question as to whether at the time he was acting in the line of his employment.

"In cases of this kind, where it is shown that the wagon and team doing damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the wagon and team were in possession of the owner, and that whoever was driving it was doing so for the owner." *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040.

Was the *prima facie* case so made overcome? We think not. The driver testified that at the time of the accident he was on his way to his night lunch. He also testified, in effect, that there was no regulation prohibiting drivers from taking their cars with them to their meals; that "we always take our cars to meals, to a restaurant or some place or other;" that the drivers were generally supposed to notify the office before doing so, but that he had on different occasions called up after going and there had never been any objection; that the drivers were not always allowed to take their cabs with them when going home to their meals; and at this time he had not asked permission in advance.

The respondent's counsel believing, as the record discloses he had good reason to believe, that the appellant's manager would testify that drivers were permitted to take their cars with them wherever they went for their meals, called him as a witness. He testified to the effect that it was contrary to the rules of the appellant for the drivers going home to their meals to take their cars. Proper impeaching questions having been asked, the respondent was permitted to introduce the testimony of two stenographers who testified from their notes taken at the coroner's inquest. One of them testified that the appellant's manager then testified as follows:

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"Wherever he (the driver) goes to eat his supper he is supposed to call up then and give us his 'phone number, wherever he is eating. . . . Q. And he is permitted to take his car right with him to where he goes to eat? A. Yes sir, we permit them to do that; if he would walk it would consume too much time, especially those that are living with their folks and living out in the residence district; it would entail an hour or an hour and a half practically, where it would only take a half hour with the car."

The testimony of the other stenographer agreed with this in every substantial particular. This evidence was competent for the purpose of impeachment, and the rulings of the court when it was offered indicate that it was only admitted for that purpose. Its weight was for the jury. We cannot say, as a matter of law, that the testimony of the appellant's manager at the trial that it was contrary to the rules of the appellant for its drivers going to their homes for their meals to take their cars with them, thus weakened by this impeaching evidence, was sufficient to overcome the *prima facie* proof that the driver was acting in the line of his employment, made by the admitted fact that the car was appellant's car and the driver the regular employee of the appellant.

Counsel now urges that the testimony of the stenographers was received as substantive evidence of an admission binding upon the appellant. While it was objected to as not proper for that purpose, that objection was coupled with an objection that it was not competent for impeachment, and that respondent could not impeach her own witness. It was clearly admissible for impeachment, and under the circumstances the respondent had the right to impeach this witness. His testimony was clearly a surprise. The court overruled the objection as a whole, and afterwards ruled that, to impeach the witness, the respondent was entitled to introduce the exact language used by the witness at the inquest. If the appellant was not satisfied that this limited the admission of the evidence to the single purpose of impeachment, it should have

asked for an instruction so limiting it. Assuming, without deciding, that such an instruction would have been proper, no request for it having been made, the objection cannot now be urged. Moreover, the evidence shows that the manager of the appellant company had with him at the inquest the attorney for that company who assisted in questioning him at that time, and that the attorney was at the inquest to protect the interests of the appellant company. Under these circumstances, there would be strong reason for holding that the admissions of its manager at that time were binding upon the appellant. We find it, however, unnecessary to decide this point since it cannot be fairly said that the evidence was admitted except for the purpose of impeachment. The jury found in answer to a special interrogatory that the driver at the time in question had permission from the defendant company to use the cab in going to his meals. We cannot say that this is contrary to the evidence, limited to the purpose for which it was plainly competent.

It is next contended that the evidence failed to show any negligence on the part of the driver of the taxicab. The negligence alleged was excessive speed and failure to sound any bell or horn within thirty feet of a street crossing in violation of a city ordinance. There was evidence tending to show that the cab was equipped with two lamps in front and that such lamps would throw a light a distance of from 200 to 250 feet. There was also evidence that the cab was running at a speed of 25 miles an hour or more, and the jury so found in answer to a special interrogatory. The evidence showed that the cab was equipped with two brakes, the "emergency" and "transmission," one operated by a mere pressure of the foot and the other with a lever within easy reach of the driver; that both could be applied simultaneously and in an instant; that the driver could have seen the deceased when he was more than 100 feet distant. This the jury also found in answer to a special interrogatory. He testified that he did not see the deceased till within 25 feet;

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that he applied both brakes at once, sliding the wheels, and the cab went 25 feet before it was stopped. Deceased, when others of the sewer gang went to his assistance, was lying with his legs under the front of the cab about 18 or 20 feet from the coil of hose which he had been rolling when he was struck. There was also evidence that no horn or other alarm was sounded by the driver of the cab. The evidence showed that Sprague avenue runs east and west, and is crossed by Spokane street at right angles. On one side of Sprague, Spokane street was graded but not on the other. It was closed on both sides by barriers. This would excuse failure to sound a horn or ring a bell on approaching the crossing, and the court so instructed the jury. While all of the respondent's evidence as to excessive speed, and the driver's ability to have seen the deceased in time to stop before striking him, and the distance the cab went before finally stopping, was positively contradicted by the appellant's evidence, the questions as to whether the speed was so excessive as to constitute negligence and as to whether, by the exercise of reasonable care, the driver could have seen the deceased and stopped the cab in time to avoid striking him were plainly questions for the jury.

The jury also found in answer to a special interrogatory that the deceased was in the exercise of reasonable care for his own safety about the time he was hit by the automobile. He was at work where his duty placed him. The sewer gang had just finished flushing the catch basin, and he was rolling up a three-inch fire hose which was stretched upon the pavement. This necessitated his walking slowly in a stooping position and giving at least some attention to the work in hand. Whether he was negligent in not keeping a constant lookout for automobiles while doing his work which necessitated a position which in the nature of things would tend to prevent him from seeing an approaching vehicle was a question for the jury. One of the sewer gang known as the signalman carried a red light which he used during the

work of flushing the basins to signal vehicles and street cars to prevent them from passing over the hose. Just prior to the accident he was walking with this red light from where the deceased was across the street to the horse and hose wagon some forty feet away, and had just reached the horse and unsnapped the hitch rein when he heard the crash and the cry of the deceased caused by the cab striking him. Whether the deceased was negligent in not securing the signalman's light and keeping it with him, and whether it was practicable for him to do so, were also questions for the jury. The true rule as to the reciprocal rights and duties of persons driving vehicles, and laborers on the highway, is as follows:

"Persons riding or driving are bound to exercise reasonable care to see and avoid injuring persons who are at work in the streets, as well as pedestrians. And the laborer is not bound to neglect his occupation in order to avoid injury from the want of ordinary care on the part of drivers of vehicles. But he cannot recover if actually guilty of contributory negligence." 18 Am. & Eng. Ency. Law (2d ed), p. 586.

See, also, *Anselment v. Daniell*, 4 Misc. Rep. 144, 23 N. Y. Supp. 875; *King v. Green*, 7 Cal. App. 478, 94 Pac. 777; *Quirk v. Holt*, 99 Mass. 164, 96 Am. Dec. 725.

Error is also assigned because the court permitted the respondent to testify as to how many children she had, and that the deceased had supported them. If this was error it was not prejudicial. The only influence it could have had was to increase the amount of the verdict. It is not claimed that the verdict was excessive.

There was introduced in evidence an ordinance providing that, before reaching any street crossing, the driver of an automobile or other power driven vehicle must sound a bell at least 30 feet distant from such crossing. The appellant, in view of the fact that Spokane street was closed by barriers, requested an instruction withdrawing the issue as to the failure to sound a whistle or blow a horn, from the jury.

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Syllabus.

This was refused, but the court did instruct the jury that if it found from the evidence that Spokane street was not an open and traveled street that the ordinance would not apply, and that the evidence of such failure of warning should not be considered further. While the instruction requested by the appellant would have been proper the instruction given was sufficient. We cannot presume, in the absence of a special finding to that effect, that the jury disregarded the instruction given and considered the matter of warning at all. We find no prejudicial error in the record.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, CROW, and CHADWICK, JJ., concur.

[No. 9719. Department Two. January 23, 1912.]

BEATRICE B. MCLEOD *et al.*, *Administrators etc.*,
Respondents, v. MORRISON & ESHELMAN,
Appellant.¹

FRAUDS, STATUTE OF—SALE OF LAND—BY AGENT. Verbal authority to find a purchaser for land does not authorize the agent to execute a binding contract of sale.

VENDOR AND PURCHASER—CONTRACT—BY AGENT—RATIFICATION—BROKERS. A broker's contract to sell real estate, he only having authority to find a purchaser, is ratified where, with full knowledge of the contract and all the material facts, nothing was done to disavow the sale or question the broker's authority to make it, and letters were written promising a deed as soon as it could be secured.

SAME—BROKER'S CONTRACT UNDER SEAL—RATIFICATION. The fact that an unauthorized broker's contract to sell real estate was executed under seal, does not prevent an implied ratification of the contract from silence and acquiescence therein, especially in view of Rem. & Bal. Code, § 8751, abolishing the use of private seals in contracts and deeds.

PRINCIPAL AND AGENT—CONTRACTS OF AGENT—RATIFICATION—CONSIDERATION. No new consideration is necessary for the ratification

¹Reported in 120 Pac. 528.

of the unauthorized contract of an agent, the consideration of the original contract being sufficient.

SPECIFIC PERFORMANCE—TENDER—WAIVER. In seeking specific performance, a tender of the last deferred payment on a land contract is excused by the positive statement that it would be useless.

SPECIFIC PERFORMANCE—ACTIONS—LACHES. There is no laches which will be a defense to specific performance where the vendee did all that he could to secure a deed, and the delay was at the solicitation of the vendor.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 15, 1910, in favor of the plaintiffs, in an action for specific performance, after a trial on the merits. Affirmed.

Charles E. Patterson and Charles R. Crouch, for appellant.
G. G. Lee and Byers & Byers, for respondents.

ELLIS, J.—Appeal from a judgment decreeing specific performance of a contract for sale and conveyance of real estate.

On February 14, 1903, respondents' intestate, who lived at Toppenish, Washington, entered into a written contract with one William E. Smith for the purchase of certain lots, in Aldine Heights addition to West Seattle, for an agreed price of \$1,025. The contract acknowledged payment of \$300 on its delivery, and provided that \$375 should be paid on July 1, 1903, and \$350 on January 1, 1904. An endorsement on the contract shows payment of the first of these deferred payments on July 3, 1903. There was evidence to show that the appellant Morrison & Eshelman, a corporation, at the time of and prior to the execution of this contract, had, under an agreement with the owner of Aldine Heights addition, an option on, or at least the exclusive sale of, all lots in that addition. The evidence tended to show that the appellant corporation had listed the lots here in question with Smith as a real estate broker, with verbal authority to secure a purchaser, but had never given him

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authority to execute any contract of sale in its name or otherwise. He had only the authority of any ordinary real estate broker. Under this authority, he had, prior to the sale here in question, produced a purchaser and appellant had taken earnest money and given the purchaser a receipt for it, but this sale was abandoned. Appellant claims that, after this transaction, no authority of any kind was given Smith to sell the lots to respondents' intestate, McLeod. The secretary-treasurer of the appellant, however, testified that, after this transaction, Smith was not told that he could not sell to any one else. The evidence fails to show any revocation of Smith's authority as a broker to find a purchaser. This authority, which we must assume continued, was not sufficient to authorize Smith to execute a written contract of sale, either in his own or in appellant's name, which would be binding upon the appellant. *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471. On the whole record, it appears that Smith was agent for the appellant to find a purchaser; but if he intended to bind the appellant by the contract of sale here in question, he had not sufficient authority for that purpose.

The evidence does not show that Smith at the time of executing the contract informed the respondents' intestate that he was acting, or assuming to act, for the appellant; but it does show that, when the last payment was due, Smith could not convey title, and afterwards, in 1905, wrote the intestate that he would "see the other party about your deed for Aldine Heights;" and again, in March, 1907, as follows: "I met Mr. Eshelman yesterday afternoon, and I asked him about your calling for your deed and he said they were having trouble about a settlement with the owner and he would let me know a little later about it." While this evidence was not competent to show agency, it was competent as showing when respondents' intestate learned that Smith had assumed to act for appellant in making the contract.

The respondents' intestate, soon after this, took the mat-

ter up directly with the appellant. Appellant's secretary-treasurer testified that, some time in 1907, respondents' intestate came into appellant's office and showed him the contract. The intestate's death precluded evidence as to what demands were then made, but three letters in evidence sufficiently show that the intestate was insisting on the performance of the contract. The first of these letters, dated March 17, 1908, was signed by appellant's treasurer personally. The writer says:

"I thought we would get matters adjusted long before this so that we might be in position to deliver to you the deed for the seven lots you purchased of W. E. South (Smith) on contract, but I am sorry to say that we have not definitely reached that point yet, and cannot now state positively when we will be in position to deliver deed."

The letter goes on to explain the delay as being caused by a difficulty with the owner of the addition, and that it might be necessary for appellant to sue her before procuring deed, and then continues:

"In this event it may require some time yet before we can expect to receive the deed. If you prefer to relinquish or assign your contract on some equitable basis, to waiting for the deed, we are willing to afford you the opportunity, as we feel that you have been withheld quite too long in this matter on account of the unfortunate condition this matter has assumed."

The writer concludes with an offer to take an assignment of the contract and pay back all payments made thereon and taxes paid on the land by the intestate, with seven per cent interest on these sums. The respondents' intestate answered this letter, under date of March 25th, as follows:

"Your favor of Mar. 17th received and contents noted, and would say that in buying those lots I done so for speculation and not for 7% interest. I could have invested the money here and made 500% and have done it. If you feel like you would rather pay me \$500 per lot or \$3,500 for the seven lots we may make a deal. I have been very patient but there will be a limit to it one of those days."

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Appellant's reply to this letter was dated April 1st, and signed by the appellant corporation by its treasurer, and, among other things, contains the following:

"As desirous as we are to get this matter closed up and to give title to the property, it is quite certain we cannot convey title by deed till we can get it from this party in whom the record title now stands. If we cannot settle with this party on a reasonably fair basis, and are compelled to sue to enforce such a settlement, there is no telling how long it may take to secure deed.

"It is in view of this complicated state of affairs making it uncertain as to how long we may have yet to wait for a deed to the property and a desire to get the matter quickly adjusted that we were led to make the proposition to you that we did. If however, you prefer to abide the necessary time it may take to secure the deed, all well and good, we have no objections. We will continue to do as we have been doing, exerting our best efforts to obtain an equitable settlement with the party and secure deed for the property in question as quickly as it is possible. This is as well as we can do."

The last of these letters being signed in the corporate name, and relating to the matters discussed in the first letter, conclusively shows that the first letter was also written on behalf of the corporation, though signed by its treasurer personally.

The respondents contend that this correspondence constituted a ratification of the contract, regardless of the fact that the contract was made in the agent's name and in excess of his authority, or even in the absence of any authority. This contention must be sustained. There can be no question that the appellant had full knowledge of all the material facts connected with the transaction at the time these letters were written. At least as early as the fall of 1907, the contract had been exhibited to its secretary-treasurer. That contract with the endorsements divulged the whole transaction including the payments made and the amount unpaid. These letters written some months later conclusively

show that neither then nor afterwards did the appellant disavow the sale. In neither of these letters was Smith's authority questioned or the sale repudiated. On the contrary they tacitly assume that the appellant held itself bound to convey, and merely sought time to secure the title that it might do so. It requires much less positive action to ratify as to third persons than in favor of the agent himself. Mere silence and inaction, under the other circumstances of this case, would be strong evidence of ratification in favor of the purchaser. 1 Am. & Eng. Ency. Law (2d ed.), p. 1209; *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Hartwell v. Equitable Mfg. Co.*, 78 Kan. 259, 97 Pac. 432; *Philadelphia etc. R. Co. v. Cowell*, 28 Pa. St. 329, 70 Am. Dec. 128; *Heyn v. O'Hagen*, 60 Mich. 150, 26 N. W. 861.

In any event, these letters, coupled with appellant's knowledge of the contract upon which the respondents' intestate relied, amounted to an implied ratification of the contract. They are wholly inconsistent with any other intention.

"Ratification of the acts of an agent need not in most cases be express, but may be implied from the acts and conduct of the principal, and generally speaking a ratification may be implied from any acts or conduct on the part of the principal reasonably tending to show such an intention on the part of the principal to ratify the acts or transactions of the alleged agent, particularly where his conduct is inconsistent with any other intention, or where it appears that he has repeatedly recognized and approved similar acts done by the agent. So a ratification may be implied where the principal has carried out or offered to perform a part of an unauthorized agreement with knowledge of the whole, . . ." 31 Cyc. 1263, 1264.

See, also, *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549.

Appellant contends that, because the contract was made in the agent's name and was executed under seal, parol evidence was inadmissible to show ratification, and that no suit can be maintained against the appellant upon the sealed contract to which he was not a party. It is true that this was the rule at common law, but even at common law the rule

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did not apply when no seal was necessary to the validity of the contract. 31 Cyc. 1262; 1 Am. & Eng. Ency. Law (2d ed.), p. 1212; *Hammond v. Hannin*, 21 Mich. 373, 4 Am. Rep. 490.

Our statute, Rem. & Bal. Code, § 8751, has abolished the use of private seals to deeds and contracts in writing, and expressly declares that, "the addition of a private seal to any such instrument or contract in writing hereafter made, shall not affect its validity or legality in any respect." While this court has held that a seal to an instrument which would have required a seal at common law still imports a consideration, as it did at common law (*Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280), in most other respects the statute has abrogated the common law distinction between specialties and simple contracts. Otherwise the statute would be meaningless. *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393; *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 69 Pac. 954, 92 Am. St. 864, 58 L. R. A. 293.

The case of *Rutherford v. Montgomery*, 14 Tex. Civ. App. 323, 37 S. W. 625, is directly applicable to the questions here involved. In that case, the sole question was whether a corporation, by ratification, could be held responsible to the grantee on the warranty contained in a deed executed by an unauthorized person assuming to act as agent who took title and conveyed by warranty deed in his own name. The court, after stating the facts showing ratification, held in effect that whether the party assuming to act as agent had any original authority was immaterial to the question of ratification. As to the effect of the statute abolishing private seals, the court said:

"Nor does the fact that in this instance the instrument executed by the undisclosed agent is a deed affect the application of the principle above stated. It was held at common law that one could not be charged as a principal upon an instrument under seal, such as a deed, unless his character was disclosed upon the face of the instrument. It will be noted, however, that this distinction as to liability cannot

apply in this state, where the use of a seal is in no sense necessary to the validity of a deed. Mechem, Agency, § 702. By the act of 1858, the distinction between a sealed and an unsealed instrument is eliminated. *Clayton v. Mooring*, 42 Tex. 182. A ratification under seal is not required in this state in a case of this kind. Mechem, Agency, § 140. Nor is the transaction obnoxious to the statute of frauds, having shown a subsequent ratification of the act of the agent in signing the contract. The ratification is the equivalent of a prior authorization, and the contract is in writing, and is deemed to have been executed by the agent of the principal thereunto lawfully authorized."

Appellant next contends that the ratification was void for lack of a new consideration. No new consideration was necessary. The consideration of the original contract was sufficient to support the ratification. 31 Cyc. 1260.

It is further objected that no tender of the last deferred payment was made. It sufficiently appeared, however, that tender was prevented by the positive statement of appellant's treasurer that it would be useless. The authorities are uniform that this rendered formal tender unnecessary.

It is claimed that respondents' intestate was guilty of laches, but we think the evidence wholly fails to sustain the contention. It is plain that, both before and after the ratification, he did everything in his power to secure the deed. The delay after he came into direct communication with appellant corporation was upon its own solicitation.

It was admitted at the trial that the appellant still holds title to the lots, and is in a position to specifically perform the contract.

The judgment is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

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[No. 9734. Department Two. January 23, 1912.]

WILLIAM MORRIS, *Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY, *Appellant*.¹

TRIAL—NONSUIT—WEIGHT OF EVIDENCE. In passing on a motion for a nonsuit, where plaintiff's evidence was vague, the court is justified in taking into consideration expert evidence that plaintiff's mind had been affected by the accident.

STREET RAILWAYS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is not contributory negligence *per se* to fail to look and listen before driving across a street car track at a city street crossing; and the question is for the jury where the car was some distance away running at a high rate of speed, and the wagon would have cleared the track if the car had slowed down or been going at a reasonable rate of speed.

SAME—PROXIMATE CAUSE. The contributory negligence of the driver of a wagon in crossing a street car track at a city street crossing will not preclude a recovery if the motorman could have stopped the car in time to avoid the accident had it been going at a reasonable rate of speed; since the right of way at the crossing is not absolute, and the motorman's negligence was the proximate cause.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. The denial of new trial for insufficiency of the evidence, where it was palpably conflicting, is not an abuse of discretion, and will not be disturbed on appeal.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 15, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in a collision of a street car with a wagon. Affirmed.

Morris B. Sachs and *Will H. Thompson*, for appellant.

Frank E. Green, for respondent.

ELLIS, J.—Action by respondent against appellant for damages, for personal injuries suffered by reason of a car

¹Reported in 120 Pac. 534.

of appellant being run against respondent's wagon, on Rainier boulevard, at its intersection with Norman street, in the city of Seattle. It is claimed that appellant was negligent in running the car at a dangerous speed, and in not giving timely warning of its approach to the crossing. The trial was to a jury. At the close of respondent's evidence, appellant moved for a nonsuit, which was denied. Evidence for appellant was introduced, the cause submitted to the jury, and a verdict was returned in favor of respondent for \$1,000. Appellant's motion for a new trial was overruled, and judgment was entered against appellant upon the verdict. This appeal was taken, and there are assigned as errors: (1) The court's refusal to grant a nonsuit; (2) the court's refusal to grant a new trial.

Touching the first assignment of error, appellant's sole contention is based upon a claim that the respondent was guilty of contributory negligence in failing to look for the car before driving upon the track. Rainier boulevard runs practically north and south, and Norman street east and west; they intersect at right angles. The appellant was operating a double-tracked street car line on the boulevard. There was a straight stretch of track from the Norman street crossing for about a quarter of a mile to the north, from which direction the car came, and along which the view from the crossing was practically unobstructed. The respondent, a man seventy years old, an expressman, was driving home late in the afternoon of May 18th, 1910, along the west side of the boulevard. He stopped and watered his horse at a watering trough at the intersection of Norman street with the boulevard. He then turned and started to drive across the street car tracks, and when almost across the first track upon which ran the south bound cars the back part of one of the rear wheels of his wagon was struck by a car, turning the wagon over, throwing the respondent out, rendering him insensible and inflicting the injuries complained of.

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The respondent's testimony as to what occurred at the time was vague, confused and contradictory. It does not, however, evince a disingenuous attitude on his part, but rather a vague memory or a confused mind. His testimony as to the occurrence, eliminating much confused matter, was as follows:

"And I see no car coming until I was on the track, and then I see a car coming at a fearful rate of speed, and I tried to get the horse ahead, but it was too late. . . . Q. After your horse was up on the track as you say and the fore part of the wagon, and you saw the car coming, about how far was the car off then when you first saw it? A. Well, it was about three-quarters of a block. Q. And are those short blocks or long blocks, down there? A. They are pretty long blocks. Q. What did you do then when you saw the car first? A. Well, I tried my best to get the horse to get over quick; I thought I had plenty of time anyway, when I saw them coming at such a rate of speed. Q. Was it possible for you to back up then? A. No, that was impossible. Q. Would it have taken longer for you to back up than to go ahead? A. Yes, I don't think I could ever do it hardly. Horse fall down on the track doing that, I couldn't possibly do it, that is all. Q. You drove on ahead; did you urge your horse in any way to hurry? A. Yes, sir; I had not a whip in my hand, but I just took the reins this way (illustrating) and slapped him up, tried to get him to go ahead. Too late. Q. Did the horse go ahead? A. Yes, he was going ahead. Q. What happened? A. Well, just as I got clear of the further rail, the east rail, they hit the back of my wagon and broke the end all off of the wagon, and knocked me over towards the store about fifty feet or more, I guess, and I was right under the wagon. I didn't know any more, that is all."

On cross-examination he stated many times that he did not look up the track for the car until he was on the track, and once he said: "Why no, I don't remember that I did." On redirect examination he said: "Why yes, I looked that way I thought." And on recross he said: "I took a look around of course, before I went on the track." And when ques-

tioned again: "No, I didn't." From his whole testimony on the subject, it was manifest that he had no distinct memory of looking up the track in the direction from which the car came until he was on or nearly on the track. As to respondent's mental condition at the time of the trial, he testified, when asked as to the condition of his head since the accident:

"Well, it is not the same as it was before. I feel kind of pain very often in my head, and sleep—my sleep is not right, kind of dazed, something, I don't know."

A Mrs. Donovan, at whose house he had lived for about two years, and who nursed him at the time of the injury, testified:

"Well, as far as I can explain, when he goes to talk to you about anything he seems to do it as if his mind is away off from just what he wants to talk and he seems to forget himself."

Dr. De Soto, who had attended him regularly since the injury, testified:

"A. Well, getting worse and worse all the time; that is about it, seems to be getting weaker in both mind and body. I found that his head is affected through the injury which he received there, which is probably of course the contusion which was back here which affects the nerve— Q. (Interrupting) Back of the right ear? A. Back of the right ear, yes. Q. And what is the effect of that blow and contusion? A. Well, the only effect which I know now, from what I have treated him, would be a loss of hearing, but it may also mean that he will lose his mentality; treatment does not seem to do him any good. Q. He may lose his mind? A. Yes."

Dr. Silliman, who had examined respondent several times in consultation with Dr. De Soto, testified to practically the same condition.

In passing upon the motion for nonsuit, the trial court was justified in taking into consideration this evidence of a clouded mentality of the respondent when he testified. That

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court could not say, nor can we, that the minds of reasonable men might not differ as to whether respondent's testimony showed conclusively that he failed to look before driving upon the track.

One C. D. Gaylor, an eyewitness, testified as follows:

"A. I just spoke to him, I says—he just watered his horse and turned away from the watering trough. I says, 'Hello, Bill,' I have known him for a long time. He says, 'I am going home,' and whirled around to cross the track. There is a little raise at the track, I should say six or eight inches, maybe, from the planking up across the track. I looks up and here was car up I should say two or three blocks away from there, and I looked up and saw the car coming; it was coming (illustrating)—all you could hear, whirling right through, and Bill turned his head that way and he commenced hitting the horse with the lines to get across. The car came and took the back end of the wagon and over it went. He didn't have time. If they had slacked up at all he would have got off."

He further testified that the car was going at the rate of 25 or 30 miles an hour; that it did not slacken its speed before it struck the wagon; that it went 30 or 40 feet before stopping after striking the wagon; that no bell was rung nor whistle sounded nor warning of any kind given. On cross-examination he testified:

"Q. Did you warn Mr. Morris? A. No, there was no time to. He was going across. I thought he had plenty of time to get across the track when he started to cross. When I saw him I thought he had plenty of time to get across the track."

Mrs. Katherine Dawson, another eyewitness, testified that the horse was just getting up onto the track when she first noticed it, and the car was then a good way up the track, and was running faster than usual; that it did not slacken its speed before it struck the wagon; that it pushed the wagon along "quite a piece," and passed on some distance

before it stopped; that she did not hear any bell nor whistle nor any alarm before the car struck the wagon.

C. Vietro, another eyewitness, testified that, when he first saw the respondent, the head of the horse was just going onto the track; that he saw the car at that time between fifty and one hundred yards away; that the car was going faster than usual, about twenty-five or thirty miles an hour; that it did not slacken speed before it struck the wagon; that it passed on twenty-five or thirty feet after it struck the wagon before it stopped and that he did not hear any bell nor any whistle nor any alarm of any kind.

One Frank Worth, a passenger on the car, testified that the car was "going very fast, very fast. Not less than twenty miles an hour." "I had never ridden at that speed, to my knowledge, on a street car, before." That the brake was applied so suddenly that it threw him over against the next passenger; that the collision occurred almost immediately on the application of the brake; that just before the brake was applied the motorman was holding conversation with a gentleman standing beside him; that after the car struck the wagon, it went thirty or forty, perhaps fifty feet before it was brought to a stop.

This court, in common with other courts, has held that the failure to look and listen before attempting to cross an electric street railway track at a regular street crossing in a city is not negligence *per se*. Assuming that respondent failed to look as soon as he might, still, under the circumstances shown by the evidence, the question of contributory negligence was one for the jury. *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184; *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214; *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601.

In *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902, the facts were almost identical with those here pre-

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sented. The plaintiff's failure to look for the car till he was upon the track was urged as negligence *per se*. The court said:

"The fallacy in this, which runs all through counsel's argument, is in assuming that the degree of care required at the crossing of a highway and an ordinary steam railroad is the test of the care required in crossing the track of a street railroad on a public street. The two cases are not alike. In the first place, street cars do not, or at least ought not to, run at the same rate of speed, are not attended with the same danger, and are not so difficult to stop quickly, as those of an ordinary railroad. In the next place, the cars of a street railway have not the same right to the use of the track over which they travel. . . . It would be inexpedient to attempt any complete enumeration of the modifications of or exceptions to the general rules of equality of rights between street cars and other vehicles used on a street. But it is certain that there is no modification or exception that relieves a street railway company from exercising, at least, as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars."

The following cases are also closely analogous: *Robbins v. Springfield St. R. Co.*, 165 Mass. 90, 42 N. E. 334; *Lawler v. Hartford St. R. Co.*, 72 Conn. 74, 43 Atl. 545; *Springfield City R. Co. v. Clark*, 51 Ill. App. 626; *Dennis v. North Jersey St. R. Co.*, 64 N. J. L. 439, 45 Atl. 807; *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920; *Memphis St. R. Co. v. Riddick*, 110 Tenn. 227, 75 S. W. 924.

It was immaterial whether he looked or not, if he, as a reasonably prudent man, would have been justified in trying to cross, had he looked before starting to cross, and had he then seen the car where he and his other witnesses said it was, even after he was partially on the track. All of these witnesses concur in saying that had the car been running at a usual rate of speed he would have had plenty of time to cross. Under the evidence the question as to whether he was negligent in failing to look before starting to cross the track

was plainly one for the jury. *Burian v. Seattle Elec. Co.*, *supra*; *Nappli v. Seattle, Renton & S. R. Co.*, 61 Wash. 171, 112 Pac. 89.

Moreover, even assuming that the respondent was negligent as a matter of law, that would not preclude his recovery unless that negligence was the proximate or efficient cause of the injury. On this straight stretch of track, it is obvious that, if he could have seen the car in time to stop, the motorman on the car could have seen him in time to stop the car if it was going at a reasonable rate of speed. If the testimony of the respondent and of the other witnesses to which we have referred was true, as must be assumed on motion for nonsuit, then the car was at least one hundred and fifty or two hundred feet away when respondent drove upon the track. To one watching him, his intention to cross must have been apparent when the car was even farther away. The appellant had no absolute right of way at the crossing. Its right was no greater than that of the respondent. Their rights and duties were reciprocal. Whether the motorman could have seen the respondent's danger in time to stop the car was a question of fact. If he could, it was his duty to do so, regardless of any negligence of respondent, and the failure to do so was the proximate cause of the injury. These were questions for the jury. *Heinel v. People's R. Co.*, 6 Penn. (Del.) 428, 67 Atl. 173; *Powers v. Des Moines City R. Co.* (Iowa), 115 N. W. 494; *Atwood v. Bangor etc. R. Co.*, 91 Me. 399, 40 Atl. 67; *Baltimore Consol. R. Co. v. Rifcowitz*, 89 Md. 338, 43 Atl. 762; *Weitzman v. Nassau Elec. R. Co.*, 33 App. Div. 585, 53 N. Y. Supp. 905. The motion for nonsuit was properly overruled.

The case of *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51, is clearly distinguished from the case here upon the facts. There the accident was not at a street crossing. The plaintiff saw the car, and had ample time to stop. He was a pedestrian and had no team to distract his attention.

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The appellant's motion for a new trial was also properly denied. It is plain from our analysis of the evidence produced on respondent's part that it was ample to take the case to the jury on the question of appellant's negligence, both as to a negligently dangerous rate of speed and as to the failure to ring the bell or give other warning. It would be useless to review the appellant's evidence in detail. It positively contradicted the respondent's evidence on every material point. The appellant's contention is that a new trial should have been granted on the ground of insufficiency of the evidence to sustain the verdict. No question is raised on the court's instructions. The trial court had the right to, and is presumed to have considered the weight of the evidence. He saw the witnesses and heard them testify. He has expressed no doubt as to the sufficiency of the evidence to sustain the verdict. The motion was necessarily addressed to his discretion. Where the evidence is so palpably conflicting as that here presented the case is one for the jury. It was no abuse of discretion to refuse a new trial.

The judgment is affirmed.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 9896. Department Two. November 25, 1911.]

J. J. FRANTZ, *Respondent*, v. WILLIAM KINGSLEY, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 5, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for money lent. Affirmed.

John Arthur and Miller & Lysons, for appellant.

Fenley Bryan, for respondent.

MORRIS, J.—Respondent brought this action to recover \$2,000, claimed to have been loaned to appellant prior to April, 1909. The Nespelem Smelting & Power Company, of which Kingsley was president and manager, was also made a party defendant, under an allegation that Kingsley borrowed the money for the use and benefit of the company, and that, as evidence thereof, on April 2, 1909, the company, by Kingsley as its president, gave respondent a note for \$2,000, payable within a year, with interest at six per cent. Kingsley answered, alleging that he and Frantz were jointly interested in the promotion of the Nespelem Smelting & Power Company, and that they entered into an agreement whereby Frantz was to pay Kingsley \$2,000 in partial reimbursement of moneys advanced by Kingsley for the benefit of the company, and should further receive certain of the stock of the company; that upon this agreement, Frantz paid in \$1,220, and no more; that the note was given prior to the advancement of the \$2,000, but upon Frantz's agreement to pay the same as his share of the expenses already incurred in the promotion of the company, and was intended only as a receipt to Frantz for the money paid and to be paid by him under his agreement with Kingsley. The record here does not show any answer by the company. Upon these issues, the case went to trial, and resulted in the lower court sustaining the contention of respondent as against appellant.

The only question here involved is a simple one of fact: Was the transaction a loan to Kingsley, or was it a payment of part of the promotion expenses of the company, by one of the promoters to another. The lower court finds it was a loan. There is ample evidence to sustain the finding. Under our oft-repeated rule, such a finding, so made, will not be disturbed. No further discussion of the matter is necessary.

Judgment affirmed.

DUNBAR, C. J., ELLIS, and Crow, JJ., concur.

¹Reported in 118 Pac. 888.

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Opinion Per Curiam.

[No. 9698. Department One. December 1, 1911.]

GEORGE R. ELLIOTT, *Respondent*, v. TOLEDO FOUNDRY & MACHINE COMPANY, *Appellant*.¹

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 20, 1910. Affirmed.

Wesley J. Wuerfel (*James T. Lawler*, of counsel), for appellant.
Gill, Hoyt & Frye and R. L. Blewett, for respondent.

PER CURIAM.—This appeal involves only the denial of a motion for a continuance of the trial of the case, upon the same grounds as the motion for a continuance in the case of *Steenstrup v. Toledo Foundry & Machine Co.*, ante p. 101, 119 Pac. 16. For the reasons there stated, we conclude that there was no error in the denial of the motion for a continuance in this case. The judgment is therefore affirmed.

[No. 9806. Department One. December 29, 1911.]

FLORENCE NICHOLLS, *Respondent*, v. THE CITY OF SPOKANE, *Appellant*.²

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 3, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the death of a laborer through the fall of a retaining wall. Affirmed.

Cannon, Ferris, Swan & Lally, and A. M. Craven, for appellant.
Curtiss & Remele, for respondent.

PER CURIAM.—The respondent brought this action to recover damages for the death of her husband, which she alleges was caused by the negligence of the city. The deceased received the injury which later caused his death while working as a common laborer in the employ of the city in the Sprague avenue fill, on August 25, 1910. He had been directed by the foreman to go to a certain place to work, and in obedience to the order, he had just arrived at the designated place when the wall gave way. He was caught and crushed in the rock and debris, causing the injury from which he later died. There was a verdict and judgment for the plaintiff. The defendant has appealed.

The cause is a companion one to *Blair v. Spokane*, ante p. 399, 119 Pac. 839, and is controlled by it in every respect. Upon its authority, the judgment is affirmed.

¹Reported in 119 Pac. 19.

²Reported in 119 Pac. 842.

[No. 9381. *En Banc*. December 29, 1911.]ETTA MAY COLE *et al.*, Respondents, v. JOHN GERRICK *et al.*,
Appellants.¹

Appeal from a judgment of the superior court for King county, Main, J., entered October 31, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death of an employee engaged as a structural iron worker in the erection of a building. Affirmed.

Milo A. Root, for appellants.

Walter A. Keene, for respondents.

ON REHEARING.

PER CURIAM.—A petition for rehearing in this case having been granted, argument thereon before the court *en banc* was heard on December 28, 1911. A majority of the court being of the opinion that the judgment should be affirmed for the reason stated in the majority opinion of Department One, rendered February 17, 1911, *Cole v. Gerrick*, 62 Wash. 226, 113 Pac. 565, it is so ordered.

[No. 8961. *En Banc*. December 29, 1911.]SCANDINAVIAN AMERICAN BANK, Appellant, v. E. W. JOHNSTON,
Respondent.²

Appeal from a judgment of the superior court for King county, Neal, J., entered January 29, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action on a promissory note. Reversed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Hart, Prigmore & Evans, for respondent.

ON REHEARING.

PER CURIAM.—On respondent's petition and appellant's answer thereto, a rehearing *en banc* has been granted in this action. After such rehearing, the majority of this court conclude that the opinion heretofore filed herein, 63 Wash. 187, 115 Pac. 102, should be sustained.

It is therefore ordered that the judgment of the superior court be reversed, and that the cause be remanded with instructions to enter judgment in favor of the plaintiff in accordance with the prayer of the complaint.

¹Reported in 119 Pac. 829.

²Reported in 119 Pac. 804.

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Opinion Per Curiam.

[No. 9863. Department Two. January 9, 1912.]

RALPH A. TRIBOU, *Appellant*, v. SCHOOL DISTRICT No. 35 OF COLUMBIA COUNTY *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered April 28, 1911, upon findings in favor of the defendants, in an action on contract. Affirmed.

H. S. Blandford, for appellant.

R. M. Sturdevant and *T. P. & C. O. Gose*, for respondents.

PER CURIAM.—Appellant brought this action to recover a balance due on a subcontract taken by him from one Olson, who was the principal contractor for the erection of a school building, in district 35, in Columbia county. The court found that the principal contract provided that no subcontracts should be let; that the respondent directors did not know of the relation of appellant to Olson until after the contract price had been fully paid; and that appellant, both by word and conduct, had released the school district, if any liability existed. If we accept the findings of the trial court, and under a long line of decisions pronounced by this court we feel bound to do so, no legal principle is involved. A review of the facts upon which the court based its findings would serve no purpose. It is enough to say that the testimony conflicts in some degree, but in our opinion the judgment of the trial court is sustained by a clear preponderance of the evidence.

Judgment affirmed.

[No. 9731. Department Two. January 13, 1912.]

C. E. STILWELL, *Respondent*, v. SPOKANE ALARM COMPANY, *Appellant*.²

Appeal from a judgment of the superior court for Spokane county, Neill, J., entered March 4, 1911, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

Poindexter & Moore (O. C. Moore, of counsel), for appellant.

Joseph Rosslow, for respondent.

PER CURIAM.—This was an action to recover for services rendered, and presents only a simple question of fact. Appellant attempts to find a legal question involved, because of the fact that some of the

¹Reported in 119 Pac. 838.

²Reported in 120 Pac. 85.

services were rendered prior to the incorporation of the defendant, and at the request of a Mr. Hockett, who was the prime mover in the organization of appellant and became its president.

We do not find any legal question arising out of this situation, because the court expressly finds that, after its organization, the company adopted and made use of these services, and in consideration of respondent remaining in its employ as manager, expressly agreed to pay him for these particular services at the rate of \$100 per month. This finding is clearly supported by the testimony; and with it established, there can be no question of law involved.

The judgment is therefore affirmed.

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Trial of, see **TRIAL**.

Establishment and enforcement of trust, see **TRUSTS**.

ACTION—CONTINUED.

Rescission of contract for sale of land, see **VENDOR AND PURCHASER**, 1-5.

Breach of contract, see **VENDOR AND PURCHASER**, 6.

Place of trial, see **VENUE**.

Determination and enforcement of water rights, see **WATERS AND WATER COURSES**.

Services, see **WORK AND LABOR**.

ADDRESS:

Of owner for purpose of delivering duplicate statements of materials furnished, see **MECHANICS' LIENS**, 10-12.

ADEQUATE REMEDY:

Adequacy of remedy by appeal as affecting right to mandamus, see **MANDAMUS**, 2.

ADJOINING LANDOWNERS:

See **BOUNDARIES**.

ADJOURNMENT:

Of criminal prosecution, see **CRIMINAL LAW**, 14.

ADJUDICATION:

Operation and effect of former adjudication, see **JUDGMENT**, 3-6.

ADMINISTRATION:

Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**.

ADVERSE CLAIM:

To real property, see **QUIETING TITLE**.

To water rights, see **WATERS AND WATER COURSES**, 1.

ADVERSE POSSESSION:

As determining boundary line, see **BOUNDARIES**, 1.

Adverse claim to water rights, see **WATERS AND WATER COURSES**, 1.

AFFIDAVITS:

As part of record on appeal, see **APPEAL AND ERROR**, 7-9.

Of merits on motion to vacate judgment, see **JUDGMENT**, 1.

AGENCY:

See **PRINCIPAL AND AGENT**.

AGREEMENT:

See **CONTRACTS**.

As to boundary, see **BOUNDARIES**, 2.

ALIBI:

In prosecution for burglary, see **CRIMINAL LAW**, 5, 6.

ALIENATION:

Of affections, see **HUSBAND AND WIFE**, 5.

ALIMONY:

See **DIVORCE**, 5.

AMENDMENT:

On appeal or writ of error, see **APPEAL AND ERROR**, 15, 16.

Of complaint on appeal from justice court as harmless error, see **CRIMINAL LAW**, 27.

ANSWER:

In pleading, see **PLEADING**, 1.

APPEAL AND ERROR:

See **NEW TRIAL**, 1, 4.

Verdict of acquittal as discharge of bond on appeal from justice court, see **BAIL**.

Remedy by appeal as ground for denying certiorari, see **CERTIORARI**.
Contempt proceedings, see **CONTEMPT**, 3.

Remedy by appeal as affecting right to mandamus, see **MANDAMUS**, 2.

Review in criminal prosecutions, see **CRIMINAL LAW**, 23-29.

Assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 12, 14, 23, 24.

Proceedings of land office, see **PUBLIC LANDS**, 3.

Review of error in examination of witness as dependent on presentation of exceptions in lower court, see **WITNESSES**, 3.

V. PRESERVATION AND RESERVATION IN LOWER COURT.

1. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** In the absence of exceptions, error cannot be predicated upon the instructions. *McMillen v. Hillman*..... 27
2. **APPEAL—EXCEPTIONS—REVIEW—FINDINGS—PRESUMPTIONS.** Findings not excepted to will be presumed to be supported by the evidence. *Hunt v. Panhandle Lumber Co*..... 645
3. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** One general exception to the instructions given is insufficient to secure a review of error in certain instructions. *State v. Mallahan*..... 21
4. **APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** One general exception to separate findings given some of which are correct, and to requests for separate findings refused, is insufficient to secure a review of the evidence; and the statement of facts will be considered only as to the rulings of the court on the admission and exclusion of the evidence. *Seattle Automobile Co. v. Stimson*..... 548

APPEAL AND ERROR—CONTINUED.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

5. **APPEAL—REQUISITES—BOND.** An appeal from a judgment for \$23 costs must be dismissed where the bond on appeal, in the sum of \$200, is conditioned also as a supersedeas bond. *Smith v. Porter* 349
6. **APPEAL—BONDS—OBLIGEE—ADVERSE PARTY—FILING NEW BOND.** An appeal will be dismissed where the judgment was in favor of one of the plaintiffs, and the bond on appeal was given to the other plaintiffs, as obligees, who had no interest in the judgment; and there being in effect no bond to the adverse party, the same cannot be amended by the filing of a new bond under Rem. & Bal. Code, § 1734, allowing amendments of defects or informalities in a bond. *Bruhn v. Steffns*..... 144

X. RECORD.

7. **APPEAL—RECORD—AFFIDAVITS.** Affidavits on motion for a new trial, not made a part of the record by bill of exceptions or statement of facts, cannot be considered on appeal. *State v. Moran*.. 588
8. **APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS.** Upon appeal from an order granting a new trial, affidavits not brought up by statement of facts cannot be considered, and it is not sufficient to have them attached as exhibits without identification by the judge's certificate. *Hale v. City Cab, Carriage & Transfer Co.*..... 459
9. **APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS.** An appeal from an order denying a motion to vacate a default judgment, which appears to have been heard on affidavits, will be dismissed where the affidavits were not brought up by a bill of exceptions or statement of facts; and it is not sufficient that the defendant's affidavit was attached to and made a part of the motion, where the transcript shows that there was at least one other counter affidavit considered. *Sakai v. Keeley*..... 172
10. **APPEAL—RECORD—ORDER.** The supreme court will not consider an appeal from an order where the record on appeal does not disclose the order or any action of the court in that regard. *Hale v. City Cab, Carriage & Transfer Co.*..... 459
11. **APPEAL—RECORD—STATEMENT OF FACTS—EVIDENCE.** The decision of the trial court on an issue as to the defendant's residence, on motion for a change of venue, cannot be disturbed on appeal where the evidence on the hearing is not brought up on appeal by bill of exceptions or statement of facts. *Critler v. Jacobson & Lindstrom* 322

XVI. REVIEW.

12. **APPEAL—REVIEW—CORRECT DECISION ON INCORRECT GROUND.** Where the record on appeal is insufficient to secure a review of an order denying the vacation of a judgment, error cannot be predicated on

APPEAL AND ERROR—CONTINUED.

- the fact that the order recited an insufficient legal reason for denying the motion. *Sakai v. Keeley*..... 172
13. APPEAL—REVIEW—GRANT OF NEW TRIAL. An order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict will not be disturbed on appeal where there was a substantial conflict in the testimony. *McGraw v. Manhattan Co.* 338
14. APPEAL—REVIEW—ESTOPPEL TO ALLEGE ERROR. Where plaintiff, in proceedings to register a title under the Torrens act, moved a dismissal without prejudice, which was granted except as to a specified portion of the relief, on appeal by the plaintiff, error in denying registration, which was unappealed from, cannot be reviewed. *Krutz v. Dodge* 178
15. APPEAL—REVIEW—PLEADINGS—AMENDMENTS. In an equity case, a defective plea of *res judicata* will be deemed amended on appeal to conform to proof. *Peterson v. Wheeler*..... 519
16. APPEAL—REVIEW—AMENDMENTS TO CONFORM TO PROOF—DIVORCE. Pleadings for a divorce will on appeal be deemed amended to conform to proof that the parties were residents of the county and of the state for one year preceding the commencement of the action. *Powell v. Powell*..... 561
17. APPEAL—REVIEW—NEW TRIAL—DISCRETION. The trial court having exercised its discretion to refuse a new trial, the supreme court is not justified in granting a new trial upon conflicting evidence that made a case for the jury. *Mallett v. Seattle, Renton & Southern R. Co.* 251
18. APPEAL—REVIEW—NEW TRIAL—DISCRETION. An order granting a new trial will not be reversed on appeal unless abuse of discretion clearly appears, where the order was not made on a misconception of law. *Snider v. Washington Water Power Co.*..... 598
19. APPEAL—REVIEW—NEW TRIAL—DISCRETION. The denial of new trial for insufficiency of the evidence, where it was palpably conflicting, is not an abuse of discretion, and will not be disturbed on appeal. *Morris v. Seattle, Renton & Southern R. Co.*..... 691
20. APPEAL—REVIEW—VERDICT. A verdict supported by conflicting evidence, will not be disturbed on appeal, especially when the trial court refused to do so. *Critler v. Jacobson & Lindstrom*..... 322
21. APPEAL—REVIEW—VERDICT. Where there is competent and substantial evidence to sustain plaintiff's case, its weight and sufficiency is for the jury. *Wiles v. Northern Pac. R. Co.*..... 337
22. APPEAL—REVIEW—FINDINGS. Upon a direct controversy between the evidence of the parties, both of whom are about equally corroborated, findings of the trial judge, who heard and saw the witnesses, will not be disturbed on appeal. *Sumner Iron Works v. Winkleman Lumber Co.* 14

APPEAL AND ERROR—CONTINUED.

23. APPEAL—REVIEW—FINDINGS. Findings upon conflicting testimony, supported by the evidence, will be sustained on appeal. *Brown v. Rogers* 239
24. APPEAL—REVIEW—FINDINGS—PRESUMPTIONS—NECESSITY OF EXCEPTIONS. Where the evidence is not brought up, findings of fact, complete and sufficient as to every essential fact in the case, and not excepted to, are conclusive; and it cannot be assumed that the evidence supports the decree. *Architectural Decorating Co. v. Nicklason* 198
25. APPEAL—REVIEW—HARMLESS ERROR—PRESUMPTIONS. The presumption of prejudice from error in instructions on the issues presented by the pleadings is overcome by the presumption in favor of the judgment, where the evidence on which the verdict was based is not brought up on appeal. *Morgan v. Bankers Trust Co.*.... 617
26. APPEAL—REVIEW—PREJUDICIAL NATURE OF ERROR. Error in refusing a dismissal without prejudice as to all the lands sought to be registered under the Torrens act cannot be said to be harmless merely because the title to the land was not adjudicated, the statute requiring the court to enter a dismissal without prejudice when asked for. *Krutz v. Dodge*..... 178
27. APPEAL—HARMLESS ERROR—TRIAL—RULES OF COURT—OBSERVANCE. Nonobservance of a local rule of court with respect to copies of the instructions requested is not ground for reversal. *State v. O'Brien* 219
28. APPEAL—REVIEW—MISCONDUCT OF JUDGE. Language of the judge calculated to prejudice the jury is not ground for a reversal where the record shows it was not in the presence of the jury. *Wiles v. Northern Pac. R. Co.*..... 337
29. APPEAL—REVIEW—HARMLESS ERROR. In an action upon a note, error in ruling upon a cross-complaint relating to a second note not yet matured, is harmless where the issues thereon were tried out upon a supplemental complaint and answer after maturity of the second note. *Gibson v. Feeney*..... 531
30. APPEAL—REVIEW—HARMLESS ERROR. It is harmless to exclude the answer to a question which would not have changed the result. *Seattle Automobile Co. v. Stimson*..... 548
31. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—CURING ERROR—OTHER EVIDENCE. The erroneous admission of evidence which might have affected the verdict will not be held harmless because the conviction was sustained by other evidence, unless it is clearly shown that it was nonprejudicial. *State v. Nist*..... 55
32. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. In an action for wrongful death, it is not prejudicial error to allow the widow to testify as to the number of her children and how the deceased sup-

APPEAL AND ERROR—CONTINUED.

- ported them, when it is not claimed that the damages are excessive. *Burger v. Tazicab Motor Co.*..... 676
33. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—FACTS OTHERWISE ESTABLISHED. In a prosecution for assault, the exclusion of evidence of the character of the wound, taken in connection with a remark of the prosecuting attorney that the person assaulted had since died, is not prejudicial in that the jury might be led to believe that death resulted from the assault, where the jury were instructed that the remark could be considered only to account for the absence of the party as a witness; and especially where the wound was described by the attending physician. *State v. O'Brien*..... 219
34. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED. It is not prejudicial error to exclude the evidence of a physician as to the conditions of a fracture at the time of the injury, where he made a physical examination just before the trial and testified as to its condition at that time, and the excluded evidence would have added nothing material. *Campbell v. Winslow Lumber Co.* 507
35. APPEAL—REVIEW—HARMLESS ERROR. On a trial *de novo*, error in the exclusion of a deposition which is brought up on appeal is harmless. *Metcalfe v. Sackman*..... 580
36. APPEAL—REVIEW—HARMLESS ERROR—GROUND FOR NEW TRIAL—INSTRUCTIONS CURED. In an action for personal injuries sustained through alleged defects in a work car which jumped the track, it is not such error as to warrant the granting of a new trial to instruct the jury that the plaintiff could not recover if the jumping of the track was the result of a dangerous rate of speed combined with an unsafe condition of the car, without distinguishing between a dangerous rate of speed for a car in good condition and one in bad condition, where in numerous other instructions the jury were told that the plaintiff could not recover even if the car was in an unsafe condition, unless the jumping of the track was the result of such unsafe condition. *Cheichi v. Northern Pac. R. Co.*..... 36
37. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS — MASTER AND SERVANT—FACTORY ACT—EVIDENCE. It is not prejudicial error to refuse to give an instruction as to the *prima facie* effect of a certificate of the state labor commissioner on the inspection of machinery to be guarded, under the factory act, to which the party was entitled, where by other instructions an equal burden was put on the party, the jury being told that the burden was upon the plaintiff to establish one or more of his allegations of negligence, that negligence was never presumed, and must be proven by the fair preponderance of the evidence, and the court read the first section of the factory act and otherwise fully covered the law of the case. *Rommen v. Empire Furniture Mfg. Co.*..... 48

APPEAL AND ERROR—CONTINUED.

38. APPEAL—HARMLESS ERROR—TRIAL—INSTRUCTIONS. Refusing requests for instructions because not made within the time required by a rule of court is not prejudicial error, where the instructions given sufficiently stated the law of the case. *State v. O'Brien*.. 219
39. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. Technically erroneous expressions in a charge to a jury are harmless, where the instructions as a whole fairly state the law. *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*..... 663
40. APPEAL—REVIEW—HARMLESS ERROR—FINDINGS. Findings outside the issues in a divorce case do not vitiate a decree supported by other findings. *Powell v. Powell*..... 561
41. APPEAL—DECISION—LAW OF CASE. A decision on appeal that a demurrer was properly overruled, and that certain evidence was improperly excluded, becomes the law of the case, and error cannot be assigned thereon upon a second appeal. *O'Brien v. McKelvey*.. 18

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

42. APPEAL—DECISION—REMAND. Upon reversing a nonsuit, granted at the close of plaintiffs' case, the case must be remanded for a new trial, notwithstanding that the testimony of the defendant, when called as a witness for the plaintiff, indicates that the plaintiff would be entitled to judgment; since the defendant cannot be foreclosed from making his defense. *McIntyre v. Johnson*..... 567

APPEARANCE:

1. APPEARANCE—EFFECT—PROCESS—WAIVER OF SUMMONS. An answer on the merits by a foreign corporation, with a cross-complaint seeking a money judgment, is a general appearance that waives any error in denying defendant's motion to quash service of a summons. *Steenstrup v. Toledo Foundry & Machine Co.*..... 101

APPLIANCES:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 2, 11.

APPLICATION:

Of proceeds of sale as affecting negotiability of note, see BILLS AND NOTES, 3.

Of payments on account for materials furnished contractor, see MECHANICS' LIENS, 6.

APPOINTMENT:

Of guardian *ad litem*, see INFANTS.

APPORTIONMENT:

Of assessments for public improvements, see MUNICIPAL CORPORATIONS, 12-14.

APPRAISAL:

Of homestead and setting aside for widow, see **EXECUTORS AND ADMINISTRATORS**, 1.

APPROPRIATION:

Of water rights in public lands, see **WATERS AND WATER COURSES**, 1.

ARGUMENT OF COUNSEL:

In civil actions, see **TRIAL**, 3.

ASSAULT:

Evidence in prosecution for, see **CRIMINAL LAW**, 7.

Conviction of lesser degree of offense, see **INDICTMENT AND INFORMATION**, 2.

1. **ASSAULT—AGGRAVATED ASSAULT—INFORMATION—SUFFICIENCY.** An information for an assault with intent to commit sodomy, under Rem. & Bal. Code, § 2414, subd. 6, providing that one committing an assault with intent to commit a felony shall be guilty of assault in the second degree, is sufficient without stating the precise facts constituting the attempt, although the completed felony may be committed in various ways; since it is sufficient to allege a general attempt, and the assault is charged in the language of the statute. *State v. Harsted*..... 158
2. **ASSAULT—EVIDENCE—MATERIALITY—DEATH OF PARTY.** In a prosecution for assault in the second degree, where the one assaulted died before the trial, it is not error to exclude evidence as to the cause of his death. *State v. O'Brien*..... 219

ASSESSMENT:

Compensation for property taken or injured for public use, see **EMINENT DOMAIN**, 3, 5-9.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 6-24.

ASSETS:

Of estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 1.

ASSIGNMENTS:

Subsequent deed by owner as assignment of award in condemnation, see **EMINENT DOMAIN**, 8.

Leases, see **LANDLORD AND TENANT**, 2, 3.

Recording assignment of mortgage, see **RECORDS**, 1.

Title of recording act as including record of assignments of mortgages, see **STATUTES**, 2.

ASSUMPTION:

Of former partnership debts by new corporation, see **CORPORATIONS**, 1.

Of risk by employee, see **MASTER AND SERVANT**, 11-13, 19.

Of risk by person falling on stairway, see **THEATERS AND SHOWS**.

ATTORNEY AND CLIENT:

Absence of counsel as ground for continuance, see **CONTINUANCE**, 1.
 Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 23.
 Allowance of counsel fees in divorce proceedings, see **DIVORCE**, 7.
 Attorney as purchaser at execution sale, see **EXECUTION**, 3.
 Misconduct as ground for new trial, see **NEW TRIAL**, 1, 2.
 Argument and conduct at trial, see **TRIAL**, 3.

1. **ATTORNEY AND CLIENT—COMPENSATION—EXCESSIVE FEES.** An attorney's charges of \$50 each for appearing in numerous cases in justice court in trivial matters are excessive and exorbitant. *Baldwin v. Mills*..... 302
2. **SAME.** An attorney's charges of \$375 for making up the issues in a simple ejectment suit is an unreasonable fee. *Baldwin v. Mills* 302
3. **SAME.** An attorney's charge of \$75 for writing a few letters concerning the price of a jack is unreasonable. *Baldwin v. Mills*.. 302
4. **SAME.** An attorney's charges of \$200 a year for general legal services, so mystical and indefinite that they cannot be itemized, no real legal questions being involved, are excessive. *Baldwin v. Mills* 302
5. **ATTORNEY AND CLIENT—COMPENSATION — CONTRACTS — VALIDITY — PUBLIC POLICY—PROMOTION OF DIVORCE SUIT.** A contract for the employment of an attorney is void as against public policy and sound morals, where the attorney was to secure evidence to coerce from a husband the largest possible share of his separate property for the benefit of the wife, and if necessary to begin an action for a divorce for that purpose, when in fact the wife had no grounds for a divorce; and the invalidity of the contract is not affected by the provisions of Rem. & Bal. Code, § 474, which leaves the compensation of attorneys to the agreement of the parties, or by the fact that parties to a divorce suit may agree upon a division of their property. *Delbridge v. Beach*..... 416

AUTHORITY:

Of corporate officers or agents, see **CORPORATIONS**, 3, 4.
 Final judgment of conviction as authority for custody, see **ESCAPE**, 2.
 Of agent to execute binding contract of sale, see **FRAUDS, STATUTE OF**.
 Of agent, see **PRINCIPAL AND AGENT**.
 Of trustee, see **TRUSTS**, 1.

AUTOMOBILES:

Injury to third person by servant of owner, see **MASTER AND SERVANT**, 27, 28.
 Collision with person in city street, see **MUNICIPAL CORPORATIONS**, 26-28.

AWARD:

- Of property on divorce, see **DIVORCE**, 4, 5.
- Of damages in condemnation proceedings, see **EMINENT DOMAIN**, 5, 7-9
- Of damages in condemnation proceedings as bar to subsequent assessment, see **MUNICIPAL CORPORATIONS**, 16, 17.

BAIL:

1. **BAIL—RELIEF FROM FORFEITURE—ACQUITTAL—EFFECT—DISCHARGE OF BOND.** A verdict of not guilty in the superior court, upon appeal from justice court, discharges the appeal bond, and judgment forfeiting the bond, even if entered a few minutes before the verdict was received, is error. *State ex rel. Gabe v. Main*..... 381

BANKRUPTCY:

1. **BANKRUPTCY—DISCHARGE—REVIVAL BY NEW PROMISE—REQUISITES.** A letter by a bankrupt stating that he had paid some and expected to pay more of his discharged debts, specifying one that would be the next one, followed by another letter stating that he would hold the promise good but did not know when he could do what he wanted to, is not sufficient to revive the debt, under the rule that the new promise must be clear, distinct and unequivocal. *Coe v. Rosene* 73

BAR:

- Conclusiveness of condemnation judgment, see **EMINENT DOMAIN**, 4, 5.
- Limitation as bar to action for alienation of affections, see **HUSBAND AND WIFE**, 5.
- Of action by former adjudication, see **JUDGMENT**, 3-6.
- Of action by limitation, see **LIMITATION OF ACTIONS**.
- Award of damages in condemnation proceedings as bar to subsequent assessment, see **MUNICIPAL CORPORATIONS**, 16, 17.

BENEFITS:

- Assessment for from public improvement, see **MUNICIPAL CORPORATIONS**, 8-11, 13, 14, 16-21, 24.

BILL OF EXCEPTIONS:

- As part of record no appeal, see **APPEAL AND ERROR**, 7, 9, 11.

BILLS AND NOTES:

- Execution of note by corporation or officer, see **CORPORATIONS**, 3, 7.
- Relief to innocent party through failure of lien claimant to present check, see **EQUITY**.
- Guaranty of payment of note, see **GUARANTY**.
- Right to enforce lien after failure to cash checks given for amount of claims, see **LOGS AND LOGGING**, 2.
- Inconsistent defense in action on note, see **PLEADING**, 1.

BILLS AND NOTES—CONTINUED.

1. **BILLS AND NOTES—NEGOTIABILITY—STATUTES—CONSTRUCTION.** A note is negotiable, although due in installments without showing upon its face the amount due at maturity, under Rem. & Bal. Code, § 3392, defining a negotiable instrument to be one that contains an unconditional promise to pay a sum certain in money, and § 3393, providing that the sum is certain although it is to be paid with interest, by stated installments, with provision that all shall become due on any default, and for costs of collection or attorney's fees if not paid on maturity. *Barker v. Sartori*..... 260
2. **BILLS AND NOTES—NEGOTIABILITY—PROVISIONS OF MORTGAGE.** The provisions of a mortgage securing a negotiable promissory note are not imported into the note so as to affect its negotiability. *Barker v. Sartori* 260
3. **BILLS AND NOTES—NEGOTIABILITY—AGREEMENT TO APPLY PROCEEDS OF SALE.** A promissory note for a specified sum payable on demand is not made conditional as to amount or uncertain as to time, so as to be nonnegotiable, with the definition of Rem. & Bal. Code, § 3392, by the addition of a provision that this note is given to take up the freight and rehandling of a certain car and proceeds from resale of car to apply on the note; since, construing all of the terms of the note together, the agreement does not make the note payable only out of the proceeds of the resale of the car, but was to apply proceeds in case of a resale before demand, and to reimburse the makers in case of resale after demand. *First National Bank v. Sullivan* 375
4. **BILLS AND NOTES—NEGOTIABILITY—CONDITIONS.** Rem. & Bal. Code, § 3394, defining an unconditional promise to pay as one which designates a particular fund out of which reimbursement is to be made, but not to pay only out of a particular fund, is but declaratory of the common law, and a note is negotiable if the general credit of the maker accompanies the note. *First National Bank v. Sullivan* 375
5. **BILLS AND NOTES—BONA FIDE HOLDERS—DEFENSES—WANT OF CONSIDERATION.** Negotiable promissory notes executed by the maker cannot be held void for want or illegality of consideration, when in the hands of holders for value, before maturity, without notice of any defect. *Barker v. Sartori*..... 260
6. **BILLS AND NOTES—TRANSFERS—BONA FIDE PURCHASERS—NOTICE OF DEFECT.** The purchasers of notes secured by mortgages are not put upon inquiry as to want of consideration from the fact that the property was not worth the face of the note, or that a note was indorsed by a trustee of the payee, where it appears that they either looked at the property and were satisfied that it was good, or knew the payee and the trustee who had authority to make the indorsement, and relied on the indorsement, their only duty being to inquire into the regularity of the indorsement. *Barker v. Sartori*. 260

BILLS AND NOTES—CONTINUED.

7. **BILLS AND NOTES—CHECKS—PRESENTATION—WANT OF DILIGENCE—EXCUSE FOR FAILURE TO PRESENT.** Failure to present checks is not excused because it was difficult and inconvenient to leave camp and present the checks in person, where the checks could have been presented in due course of mail, and would have been paid if so presented. *Hunt v. Panhandle Lumber Co.*..... 645
8. **BILLS AND NOTES—BONA FIDE PURCHASERS—ACTIONS—DEFENSES—FRAUD.** In an action on a note, a verdict for the plaintiff is properly directed where the defense of fraud was supported by but little evidence to impeach it in the hands of the original payee, and none at all in the hands of a *bona fide* purchaser before maturity. *Sanderson v. Stay*..... 350
9. **BILLS AND NOTES—ACTIONS—ANSWER—FRAUD—SUFFICIENCY.** An answer states a good defense to an action upon promissory notes, where it alleges that the defendant's signature was procured by fraud while he was so intoxicated that he did not know what he was doing and that the consideration for which the notes were given never passed. *Gibson v. Feeney*..... 531
10. **BILLS AND NOTES—DEFENSES—FRAUD—ESTOPPEL TO ASSERT DEFENSE.** Failure to promptly deny liability on notes, procured by fraud while intoxicated, does not estop the defendant from asserting his defense, where he then claimed that he had no recollection of signing the notes. *Gibson v. Feeney*..... 531

BLASTING:

Injuries to third persons by negligence of contractor, see **MASTER AND SERVANT**, 29, 30.

BONA FIDE INCUMBRANCERS:

Right to rely on satisfaction by mortgagee where assignment of mortgage not recorded, see **MORTGAGES**, 1.

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 5, 6, 8.

BONDS:

On appeal, see **APPEAL AND ERROR**, 5, 6.

Verdict of acquittal as discharge of appeal bond, see **BAIL**.

Mandamus to compel state auditor to issue warrant for school bonds purchased, see **MANDAMUS**, 3.

Contractor's bonds, see **MUNICIPAL CORPORATIONS**, 1.

Of consolidated school districts as in excess of limitation, see **SCHOOLS AND SCHOOL DISTRICTS**.

BOUNDARIES:

Estoppel to dispute, see **ESTOPPEL**, 2.

Of assessment district, see **MUNICIPAL CORPORATIONS**, 12.

BOUNDARIES—CONTINUED.

1. BOUNDARIES—EVIDENCE TO ESTABLISH—SUFFICIENCY—ADVERSE POSSESSION—ESTOPPEL. Upon a dispute as to the true location of a line between two lots, plaintiffs failed to sustain the burden of proof and are estopped to assert title to a strip 2.44 feet wide outside of their fence, where it appears that they built a fence upon what they supposed was the true line and maintained the same and made no claim to the additional strip for thirteen years, and defendants bought the adjoining lot supposing the fence to be on the line and held possession for more than ten years; there also being evidence on the part of defendants that the fence was set on the line marked by the original stakes, and was pointed out as the line by the common grantor. *Rippey v. Harrison*..... 109
2. BOUNDARIES — ESTABLISHMENT — AGREED LOCATION. Practical or agreed location of a boundary line results where a fence on the supposed boundary was pointed out to the vendee, who took possession and made valuable improvements close to the line without any protest upon the part of the vendor, and the same was acquiesced in for seventeen years. *Windsor v. Sarsfield*..... 576
3. BOUNDARIES—LIABILITY OF SURVEYOR—ERRONEOUS SURVEY—NEGLECT. Where a surveyor was employed to establish the lines of a lot for the purpose of erecting thereon an apartment house, and such a house, not an expensive one of its kind, was erected in reliance on the survey, the surveyor is liable in damages for the cost of removal of the building where, through negligence and error in the survey, the house was placed five feet in the street, and the owner was compelled to move it. *Taft v. Rutherford*..... 256
4. SAME—NEGLIGENT SURVEY—DEFENSES. Where a surveyor was employed to make an accurate survey of a lot for the purpose of erecting thereon an apartment house, he cannot escape liability for negligence by showing that the survey was not guaranteed and that it was customary to give a certificate of accuracy upon the payment of a larger fee than he was paid. *Taft v. Rutherford*..... 256
5. SAME—EVIDENCE—PROOF OF NEGLIGENT SURVEY—SUFFICIENCY. In an action against a surveyor for damages from an erroneous survey of a lot, negligence is shown by evidence that the survey was wrong and that the parking strip was overlooked or the figures on the chain misread. *Taft v. Rutherford*..... 256

BREACH:

Of contract, see CONTRACTS.

Damages for breach of contract, see DAMAGES, 1.

Of contract to convey land and liability for improvements, see IMPROVEMENTS.

Of contract of sale, see SALES.

Of contract for sale of land, see VENDOR AND PURCHASER.

Of contract for services, see WORK AND LABOR.

BRIBERY:

1. **BRIBERY—PUBLIC OFFICERS—STATUTES—CONSTRUCTION—EJUSDEM GENERIS.** Rem. & Bal. Code, § 2320, defining bribery as to certain enumerated officers, and providing that it shall be a crime to give a reward "to a person executing any of the functions of a public officer other than those heretofore specified," is not subject to the rule of *ejusdem generis*; but covers the bribery of all public officers. *State v. Nick* 134
2. **BRIBERY—PUBLIC OFFICERS—INDICTMENT—SUFFICIENCY.** An indictment for bribing a police officer of the city of Seattle to influence him not to prohibit and prevent the accused from conducting a house of prostitution, is not demurrable as failing to allege that a policeman of a city is a "public officer" within Rem. & Bal. Code, § 2320, under which the indictment was drawn; since the description of the act which he was bribed to do sufficiently shows that he was an officer, and inferentially alleges his authority; and, also, for the reason that the court will take judicial notice of the city charter, from which it appears that a policeman is such a public officer. *State v. Nick*..... 134

BRIDGES:

Assessment for benefits from contemplated construction of, see **MUNICIPAL CORPORATIONS**, 18.
 Construction by city, see **NAVIGABLE WATERS**.

BROKERS:

Authority to execute contract of sale, see **FRAUDS, STATUTE OF**.

1. **BROKERS—CONTRACT—LIABILITY TO PURCHASER—PRINCIPAL AND AGENT.** Where the owners authorized defendant to sell land to reimburse himself for indebtedness and to retain any excess as pay for his services in making the sale, defendant's agreement with plaintiffs, the vendees, to procure a clear title and to discharge all claims against the land for a specified sum, is his personal contract, and the owners are in no way liable thereon; as the contract could be enforced only against parties thereto. *McIntyre v. Johnson* 567
2. **BROKERS—CONTRACT—SALE BY AGENT—RATIFICATION.** A broker's contract to sell real estate, he only having authority to find a purchaser, is ratified where, with full knowledge of the contract and all the material facts, nothing was done to disavow the sale or question the broker's authority to make it, and letters were written promising a deed as soon as it could be secured. *McLeod v. Morrison & Eshelman*..... 683
3. **SAME—BROKER'S CONTRACT UNDER SEAL—RATIFICATION.** The fact that an unauthorized broker's contract to sell real estate was executed under seal, does not prevent an implied ratification of the

BROKERS—CONTINUED.

contract from silence and acquiescence therein, especially in view of Rem. & Bal. Code, § 8751, abolishing the use of private seals in contracts and deeds. *McLeod v. Morrison & Eshelman*..... 683

BUILDING CONTRACTS:

See PRINCIPAL AND SURETY.

BURDEN OF PROOF:

To show estoppel, see ESTOPPEL, 3.

BURGLARY:

Accomplices, see CRIMINAL LAW, 2-4.

1. **BURGLARY—IDENTIFICATION OF PROPERTY—EVIDENCE—ADMISSIBILITY.** Upon a prosecution for the burglary of a millinery store, in which a large number of plumes were taken, it is proper to allow the state to show that plumes found at the home of the defendant were of the same kind and similar in appearance to the plumes stolen, where that was the best evidence of identification obtainable. *State v. Mallahan*..... 21

CANCELLATION OF INSTRUMENTS:

Setting aside tax deed, see TAXATION, 4.

Rescission of contracts, see VENDOR AND PURCHASER.

CARRIERS:

1. **CARRIERS—EJECTION OF PASSENGER—DAMAGES—EXEMPLARY DAMAGES—HUMILIATION—INSTRUCTIONS.** In an action for wrongful ejection of an intoxicated passenger from a train, instructions allowing damages for mental suffering and humiliation, without distinguishing between rightful and wrongful ejection, are not prejudicially erroneous, where other instructions properly limited the recovery for a rightful ejection to damages unnecessarily inflicted, and another instruction correctly stated the elements for a rightful and wrongful ejection, and the instructions as a whole defined the duties and rights of the parties. *Wiles v. Northern Pac. R. Co.*..... 337
2. **CARRIERS—EJECTION—DAMAGES—EXCESSIVE VERDICT.** A verdict for \$523.93 for the wrongful ejection of a passenger from a train is excessive, and should be reduced to \$300, where plaintiff suffered but slight rheumatism from exposure, and his loss of time and expenses did not entail a loss exceeding \$200. *Wiles v. Northern Pac. R. Co.* 337

CERTIFICATE:

Of clerk as proof of result of local option election, see INTOXICATING LIQUORS, 3, 5.

CERTIORARI:

1. **CERTIORARI—WHEN LIES—REMEDY BY APPEAL.** Certiorari does not lie to review an order denying a motion to quash a summons on the ground that service was not made in the manner prescribed by law, since the same is reviewable on appeal from the final judgment. *State ex rel. Coplen v. Superior Court*..... 225

CHANGE OF VENUE:

Of civil actions, see **VENUE**.

CHARACTER:

Of prosecutrix in prosecution for rape, see **RAPE**, 2.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 19-22, 24.

To jury in civil actions, see **TRIAL**, 1, 6.

CHARTER:

Provisions for claims for damages for personal injuries, see **MUNICIPAL CORPORATIONS**, 29, 30.

CHattel MORTGAGES:

1. **CHattel MORTGAGES—FILING AND RECORDING—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 3661, requiring chattel mortgages to be "filed" with and indexed by the county auditor and that they shall "remain on file for the inspection of the public," and § 3665, providing that chattel mortgages to secure the sum of \$300 may be "recorded" and indexed with like force and effect as if this act had not been passed, but that they shall "also be filed and indexed as required by this act," a chattel mortgage for over \$300, if recorded, need not remain on file, in order to give notice thereof to creditors of the mortgagor. *Van Winkle v. Mitchum*..... 296
2. **CHattel MORTGAGES—STOCK OF GOODS—POSSESSION AND SALES BY MORTGAGOR—FRAUD UPON CREDITORS.** A chattel mortgage of a stock of goods which permits the mortgagor to remain in possession, and by contemporaneous parol agreement to sell goods for the purpose of replenishing his stock and paying expenses instead of applying all of the proceeds to the payment of the mortgage debt, is not fraudulent as to creditors unless it was given for the purpose of aiding the mortgagee to accomplish that purpose. *Van Winkle v. Mitchum* 296

CHECKS:

See **BILLS AND NOTES**, 7.

CHILD:

See **INFANTS**.

CITIES:

See **MUNICIPAL CORPORATIONS**

CLAIMS:

Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 2, 3.

Liens for labor and material, see **MECHANICS' LIENS**.

Against city, presenting, see **MUNICIPAL CORPORATIONS**, 29, 30.

CLOUD ON TITLE:

See **QUIETING TITLE**.

COLLATERAL ISSUE:

Impeaching witness upon collateral matter, see **WITNESSES**, 6.

COLLISION:

In city street between automobile and pedestrian, see **MUNICIPAL CORPORATIONS**, 26-28.

Between street car and vehicle, see **STREET RAILROADS**.

COMMERCE:

Carriage of goods and passengers, see **CARRIERS**.

COMMISSIONERS:

Powers of eminent domain commissioners in apportioning cost of public improvement, see **MUNICIPAL CORPORATIONS**, 13, 14.

COMMITMENT:

Sufficiency of judgment of conviction as, see **ESCAPE**, 1, 2.

COMMON CARRIERS:

See **CARRIERS**.

COMMUNITY PROPERTY:

See **HUSBAND AND WIFE**, 1-3.

COMPENSATION:

Of attorney, see **ATTORNEY AND CLIENT**.

Attorney's fees in divorce suit, see **DIVORCE**, 7.

For property taken or damaged for public use, see **EMINENT DOMAIN**, 3, 5-9.

For improvements, see **IMPROVEMENTS**.

Award of as bar to subsequent assessment, see **MUNICIPAL CORPORATIONS**, 16, 17.

COMPETENCY:

Of experts as witnesses, see **EVIDENCE**, 6.

Of evidence in criminal prosecution, see **PROSTITUTION**, 3.

COMPLAINT:

In criminal prosecutions, see **INDICTMENT AND INFORMATION**.

COMPROMISE AND SETTLEMENT:

1. **COMPROMISE AND SETTLEMENT—EFFECT.** Where defendant was bound to pay \$7,250 for plaintiff's interest in certain lots, a second contract whereby plaintiff agreed to sell defendant a part, if not all, of the property, for the sum of \$4,500, was intended to discharge the first contract, and is in the nature of a compromise and settlement. *Ekre v. Cain*..... 659

CONCLUSIVENESS:

- Of condemnation decree, see **EMINENT DOMAIN**, 4, 5.
- Of order appraising and setting aside homestead to widow, see **EXECUTORS AND ADMINISTRATORS**, 1.
- Of judgment, see **JUDGMENT**, 3-6.

CONDEMNATION:

- Taking or damaging property for public use, see **EMINENT DOMAIN**.

CONDITIONS:

- Precedent to rescission by vendee, see **VENDOR AND PURCHASER**, 3.

CONDUCT:

- Of counsel at criminal trial, see **CRIMINAL LAW**, 23.
- Of attorney ground for new trial, see **NEW TRIAL**, 1, 2.
- Of jury ground for new trial, see **NEW TRIAL**, 3, 4.
- Of attorney at trial, see **TRIAL**, 3.

CONFESSION:

- Admissibility in evidence, see **CRIMINAL LAW**, 1.

CONFIRMATION:

- Of assessment for local improvement, see **MUNICIPAL CORPORATIONS**, 22, 23.

CONSIDERATION:

- Of bill of exchange or promissory note, see **BILLS AND NOTES**, 5, 6, 9.
- For corporate contract, see **CORPORATIONS**, 2.
- Failure of on exchange of property, see **EXCHANGE OF PROPERTY**.
- Of guaranty, see **GUARANTY**.
- For indemnity mortgage, see **MORTGAGES**, 1.
- For ratification of agent's contract, see **PRINCIPAL AND AGENT**, 2.

CONSOLIDATION:

- Bonds of consolidated district as in excess of limitation, see **SCHOOLS AND SCHOOL DISTRICTS**.

CONSPIRACY:

- Dying declarations of co-conspirator as evidence, see **HOMICIDE**, 4.

CONSTITUTIONAL LAW:

- Limitation of school district indebtedness, see **SCHOOLS AND SCHOOL DISTRICTS**.
- Subjects and titles of statutes, see **STATUTES**.

CONSTRUCTION:

- Of statute defining negotiable instrument, see **BILLS AND NOTES**, 1.
- Of statute defining bribery of officers, see **BRIBERY**, 1.
- Of statutes providing for filing and recording of mortgages, see **CHattel Mortgages**, 1.
- Of contracts in general, see **CONTRACTS**.
- Of statute providing for presence of accused at trial, see **CRIMINAL LAW**, 11.
- Of statute defining false registration, see **ELECTIONS**.
- Of separation agreement, see **HUSBAND AND WIFE**, 4.
- Of local option law with reference to giving away liquors, see **INTOXICATING LIQUORS**, 1.
- Of statute providing for bond to indemnify laborers and materialmen, see **MUNICIPAL CORPORATIONS**, 1.
- Of statute providing for filing claims against city for damages, see **MUNICIPAL CORPORATIONS**, 29.
- Of contract as to payment, see **PAYMENT**.
- Of power of attorney, see **PRINCIPAL AND AGENT**, 1.
- Of Federal grant of school lands to state, see **PUBLIC LANDS**, 4.
- Of statute providing for setting aside contracts for state lands on ground of invalid sale, see **PUBLIC LANDS**, 7.
- Of statute giving right of action to person injured by failure to guard frogs and switches, see **RAILROADS**, 3.
- Of contract of sale, see **SALES**, 1.
- Of trust agreement, see **TRUSTS**, 1, 4.

CONTEMPT:

1. **CONTEMPT—DISOBEDIENCE OF ORDER OF COURT—NOTICE OF ORDER.** An injunction being, under Rem. & Bal. Code, § 729, binding from the time the party is informed thereof, a defendant contractor is chargeable with notice of an injunctional order from the time of oral announcement thereof in open court, and is guilty of contempt if his employees disobey the order prior to the formal entry. *State ex rel. Curtiss v. Erickson*..... 639
2. **SAME—JURISDICTION—EFFECT OF OTHER REMEDIES.** The violation by defendant of an injunctional order, issued *pendente lite*, with jurisdiction, is contempt, although the court finally decides that the plaintiffs are without remedy. *State ex rel. Curtiss v. Erickson*. 639
3. **SAME—REVIEW—EVIDENCE—SUFFICIENCY.** A judgment for contempt in the violation of an injunction will not be disturbed on appeal unless the evidence shows beyond a doubt that the party was not guilty of contumacious conduct. *State ex rel. Curtiss v. Erickson* 639

CONTEMPT—CONTINUED.

4. **SAME—SENTENCE—AMOUNT OF FINE—STATUTES.** Under Rem. & Bal. Code, § 1050, the court has no jurisdiction to assess a fine in excess of \$100 for the violation of an injunctional order, where the right or remedy of the adverse party has not been prejudiced or affected. *State ex rel. Curtiss v. Erickson*..... 689

CONTEST:

Before land department, see **PUBLIC LANDS**, 1-3.

CONTINUANCE:

1. **CONTINUANCE—ABSENCE OF COUNSEL—DISCRETION.** It is not an abuse of discretion to refuse to grant a continuance upon the ground of the absence of nonresident counsel for the defendant, who was familiar with the facts and expected to try the case, but was sick at his home in another state and could not be present at the trial, resident counsel claiming that he was not in a position to intelligently conduct the defense; such a continuance being a matter of grace. *Steenstrup v. Toledo Foundry & Machine Co*..... 101
2. **CONTINUANCE—ABSENCE OF WITNESS—DILIGENCE—DISCRETION.** It is not an abuse of discretion to refuse a continuance in a criminal case, asked on account of the absence of a witness who was present when the case was set for trial and would probably have been present but for a wreck which detained him, where the case had been once continued on a like showing and due diligence was not shown by subpoenaing him, and it was not made to appear reasonably certain that he would be present later. *State v. O'Brien*..... 219
3. **CONTINUANCE—GROUNDS—FAILURE TO ANSWER INTERROGATORIES.** A continuance need not be granted for failure of the plaintiff to answer interrogatories, where they were not served until six months after the commencement of the action, and at a time when the case had been or was about to be set for trial, and a motion to strike the interrogatories was pending, with no effort made to dispose of the motion. *Steenstrup v. Toledo Foundry & Machine Co*..... 101
4. **CONTINUANCE—DISCRETION.** In a prosecution for selling liquor to an Indian, it is not an abuse of discretion, after the Indian had testified as to his parentage and that his parents were living, to refuse a continuance until the parents could be called, where it does not appear that they would testify differently. *State v. Rakich*.... 390

CONTRACTORS:

Liability for damages in regrade of street, see **MUNICIPAL CORPORATIONS**, 2.

CONTRACTS:

See **BILLS AND NOTES**; **COMPROMISE AND SETTLEMENT**; **CORPORATIONS**, 2-5, 7; **DEEDS**; **GUARANTY**; **INDEMNITY**; **PAYMENT**; **PUBLIC LANDS**, 7, 8; **SALES**; **WORK AND LABOR**.

CONTRACTS—CONTINUED.

Of employment, see **ATTORNEY AND CLIENT**, 5.
 Of broker to sell land, see **BROKERS**.
 Damages for breach, see **DAMAGES**, 1.
 Parol evidence to vary or explain, see **EVIDENCE**, 4, 5.
 Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.
 Liability of owner for value of improvements on breach of contract to convey land, see **IMPROVEMENTS**.
 Leases, see **LANDLORD AND TENANT**.
 As barred by limitation, see **LIMITATION OF ACTIONS**.
 Of agent, see **PRINCIPAL AND AGENT**, 2.
 Suretyship, see **PRINCIPAL AND SURETY**.
 Specific performance, see **SPECIFIC PERFORMANCE**.
 Trust agreements, see **TRUSTS**.
 Sales of realty, see **VENDOR AND PURCHASER**.

1. **CONTRACTS—FOR DIVISION OF PROFITS—CONSTRUCTION BY PARTIES.**
 Where plaintiff subscribed for stock in an irrigation company under an agreement that the money paid was to be used to purchase certain lands to be developed, the plaintiff to be paid one-half of the net profits derived from the company "only from the development of the one project," and before development the land was by mutual consent sold at a profit and other land purchased and later also sold at a profit without development, the plaintiff is entitled to his profits only upon the first sale, especially where he at first demanded a share of profits only on that sale and the parties seemed to have construed the contract as confined to that tract of land. *Allen v. Granger* 455
2. **CONTRACTS — CONSTRUCTION — PERFORMANCE OR BREACH — VENDOR AND PURCHASER.** Where defendant agreed to procure plaintiffs the title to land at the purchase price of \$450 per acre, which would make the price \$6,750, and agreed that with plaintiffs' payment of \$3,750 cash, he would pay off all past due claims against the land, leaving only a note of \$3,000 coming due in January to be assumed by the plaintiffs, his failure to pay \$533 interest then due on the \$3,000 note is a breach of his contract, for which he is liable in damages. *McIntyre v. Johnson*..... 567
3. **CONTRACTS—REGRADE OF LOTS—WAIVER OF DAMAGES — CONSTRUCTION.** A contract waiving damages from a regrade about to be made, contemplates only future damages, where there was evidence that no substantial damages had theretofore been sustained and no claim had been made therefor. *Sweeney v. Lewis Construction Co.*... 490
4. **CONTRACTS—REGRADE OF LOTS — BREACH — MEASURE OF DAMAGES.** Under a contract waiving damages to property from a contemplated regrade, to be completed within a specified time, on breach of the contract upon its becoming impossible to complete the regrade within the time, the work being abandoned, measure of damages to be re-

CONTRACTS—CONTINUED.

covered by the property owners is the difference in the value of the lots before the commencing of the work and their value when work was suspended, eliminating changes in market values, together with damages to buildings and loss of rentals; and not the cost of completing the work irrespective of the value of the property. *Sweeney v. Lewis Construction Co.*..... 490

CONTRADICTION:

Of witness, see **WITNESSES**, 4-7.

CONTRIBUTORY NEGLIGENCE:

Of servant, see **MASTER AND SERVANT**, 13-23.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 27.

Of person injured by street railroad, see **STREET RAILROADS**.

Of person injured by fall on stairway, see **THEATERS AND SHOWS**.

CONVEYANCES:

See **CHATTEL MORTGAGES**; **DEEDS**; **HUSBAND AND WIFE**, 1, 2; **MORTGAGES**.

To or by corporation, see **CORPORATIONS**, 2, 8.

Deed by owner after award in condemnation, see **EMINENT DOMAIN**, 8.

Of state lands, see **PUBLIC LANDS**, 7, 8.

In trust, see **TRUSTS**.

Contracts to convey, see **VENDOR AND PURCHASER**.

CORPORATIONS:

See **MUNICIPAL CORPORATIONS**.

Construction of agreement with subscriber for division of profits, see **CONTRACTS**, 1.

1. **CORPORATIONS—ORGANIZATION—PAYMENT OF PARTNERSHIP DEBTS—EVIDENCE—SUFFICIENCY.** Findings to the effect that, on the formation of a corporation by three stockholders, all the debts of a former co-partnership existing between two of them were not agreed to be paid by the new concern, are sustained, where of the three, two interested witnesses testified that only certain specified debts were included, one of them testifying against his own interest. *Lee v. Steinhart Lumber Co.*..... 572
2. **CORPORATIONS—REPRESENTATION—OFFICERS—PROPERTY ACQUIRED—CONTRACTS—CONSIDERATION—EVIDENCE—SUFFICIENCY.** The evidence sufficiently shows that certain properties and stock were secured by the president of a corporation for the use and benefit of the corporation, so as to constitute consideration for the corporation's note to repay the purchase price advanced, where the corporation took a formal assignment of the stock of the company holding title to the properties, and continued in the possession and control of the same. *Sesnon v. Lindeberg.*..... 1

CORPORATIONS—CONTINUED.

3. CORPORATIONS—REPRESENTATION—POWERS OF SECRETARY—NOTES—
RATIFICATION. A corporation cannot question the authority of its
secretary to execute a promissory note, where it retained possession
of stock for which the note was given, and paid interest on the note.
Seson v. Lindeberg..... 1

4. CORPORATIONS—REPRESENTATIONS—AUTHORITY OF AGENTS—EVI-
DENCE—SUFFICIENCY. A general fiscal agent and a director of a
company has no implied authority to employ brokers to sell stock
of the corporation upon a commission; and in the absence of any
evidence of authority or of the nature of the business of the com-
pany or his connection with it, it is not liable on his agreement to
pay a broker's commission on stock sold, especially where it does
not appear that the stock sold was the stock of the company. *Demp-
sey v. United Wireless Telegraph Co.*..... 167

5. CORPORATIONS—REPRESENTATIONS—CONTRACT—INDIVIDUAL LIABIL-
ITY OF OFFICERS. The evidence sufficiently shows that a contract was
made by the plaintiff direct with a corporation, rather than with its
officers individually, where negotiations were carried on in the name
of the corporation and plaintiff's offer and letters were addressed
to it. *Sweeney v. Lewis Construction Co.*..... 490

6. CORPORATIONS—REPRESENTATION—ACTION BY STOCKHOLDER—AC-
COUNTING. A minority stockholder may maintain an action for an
accounting on behalf of the corporation against a stockholder and
officer where the majority of the stockholders and of the trustees do
not desire an accounting and refuse to act. *Lee v. Steinhart Lum-
ber Co.* 572

7. CORPORATIONS—POWERS—PROMISSORY NOTES—SURETY OBLIGATION
—ULTRA VIRES. A corporation executing a note jointly with three
others, for which it received one-fourth of the consideration for
which the note was given, cannot claim that it was only a surety
as to the other makers and that the note was therefore *ultra vires*,
it being authorized to borrow money. *Seson v. Lindeberg*..... 1

8. CORPORATIONS—SALE OF PROPERTY—INADEQUATE PRICE—RIGHTS OF
MINORITY STOCKHOLDERS—INJUNCTION. A prospecting and speculat-
ing mining company, organized for the purpose of buying, selling,
and trading in real and personal property, will not be enjoined from
making a sale of all its property (a lease of coal lands) at an al-
leged inadequate price, where there was no evidence of fraud, the
officers exercised their best judgment, and the sale was ratified by a
vote of a majority of the stockholders, and the value of the land was
purely speculative; especially where the company was embarrassed
financially and unable to prevent forfeiture of the land. *Smith
v. Flathead River Coal Co.*..... 408

CORPORATIONS—CONTINUED.

9. **SAME—RIGHT TO ACCOUNTING—DEFENSES—REFUSAL.** The fact that a corporation stockholder and officer gave expert accountants assistance after the books had been obtained by legal process, does not show that he never refused an accounting, or defeat the right thereto, where it appears that he did not acknowledge the correctness of the experts' statement or admit any liability thereon. *Lee v. Steinhart Lumber Co.*..... 572

CORROBORATION:

- Of accomplices, see **CRIMINAL LAW**, 3.
Evidence of prosecutrix in prosecution for placing female in house of prostitution, see **PROSTITUTION**, 4.
Of female in prosecution for rape, see **RAPE**, 3, 4.

COSTS:

- Attorney's fees in divorce case, see **DIVORCE**, 7.

COUNCIL:

- Apportionment of public and private benefits from improvement, see **MUNICIPAL CORPORATIONS**, 14.

COURTS:

- Review of decisions, see **APPEAL AND ERROR; CERTIORARI**.
Nonobservance of local rule of as harmless error, see **APPEAL AND ERROR**, 27.
Contempt of court, see **CONTEMPT**.
Condemnation proceedings, see **EMINENT DOMAIN**.
Appointment of guardian *ad litem*, see **INFANTS**.
Mandamus to courts, see **MANDAMUS**, 1, 2.
Power to assess property generally benefited, see **MUNICIPAL CORPORATIONS**, 10.
Review of proceedings of land department, see **PUBLIC LANDS**, 3.
Jurisdiction in proceeding to register land under Torrens act, see **RECORDS**, 2.

COVENANTS:

- Judgment for nominal damages for breach of as bar to action for substantial damages, see **JUDGMENT**, 6.

CREDIBILITY:

- Of witness in criminal prosecution, see **CRIMINAL LAW**, 8.

CREDITORS:

- Conveyances by mortgagor in fraud of, see **CHATTEL MORTGAGES**, 2.

CRIMINAL LAW:

See ASSAULT; BRIBERY; BURGLARY; CONTEMPT; ESCAPE; HOMICIDE; RAPE; SODOMY.

Acquittal on appeal from justice court as discharge of bond, see BAIL. Continuance in criminal prosecution, see CONTINUANCE, 2, 4.

False registration, see ELECTIONS.

Indictment, information, or complaint, see INDICTMENT AND INFORMATION.

Violation of liquor laws, see INTOXICATING LIQUORS.

Mandamus to compel entry of judgment on verdict of not guilty, see MANDAMUS, 1, 2.

Placing female in house of prostitution, see PROSTITUTION.

Impeaching witness, see WITNESSES, 4-6.

1. CRIMINAL LAW—EVIDENCE—DECLARATIONS OF CODEFENDANT. Upon a separate trial of one charged as an accessory to a homicide, confined to acts committed at the time and place of the killing, it is error to admit evidence of threats against the deceased and of declarations in the nature of confessions, made by the principal or codefendant both before and after the homicide at times when the accessory was not present. *State v. Beebe*..... 463
2. CRIMINAL LAW—EVIDENCE—ACCOMPLICE. One who was present after a burglary when the participants divided up the spoils, is not an accomplice. *State v. Mallahan*..... 21
3. CRIMINAL LAW—EVIDENCE—ACCOMPLICE—CORROBORATION. A conviction of burglary may be had upon the uncorroborated testimony of an accomplice. *State v. Mallahan*..... 21
4. CRIMINAL LAW—EVIDENCE—ACCOMPLICE—SENTENCE—MATERIALITY. Where an accomplice who had pleaded guilty had testified that no inducements had been held out to him to testify against the defendant, it is immaterial what his sentence was, and evidence thereof is properly excluded. *State v. Mallahan*..... 21
5. CRIMINAL LAW—EVIDENCE—ALIBI—REBUTTAL. Upon a prosecution for a burglary charged on October 4, in which the defense was an alibi, and defendant was shown to have been at home during the evening and night of that day, it is proper to reopen the case to allow the state to show that the burglary was committed in the early morning of the 4th. *State v. Mallahan*..... 21
6. CRIMINAL LAW—ALIBI—EVIDENCE—RELEVANCY. Where defendant claimed that he was confined to his home by an injury to his knee, at the time of an alleged burglary, and wore a rubber bandage, which he offered in evidence, it is not error to exclude it, there being no dispute as to his wearing the same. *State v. Mallahan* 21
7. CRIMINAL LAW—EVIDENCE—OPINION—REPUTATION. In an action for assault, the quarrelsome disposition of the one assaulted cannot be shown by asking the opinion of a witness as to whether he was

CRIMINAL LAW—CONTINUED.

- a peaceable man, but only by establishing his reputation. *State v. O'Brien* 219
8. CRIMINAL LAW—CREDIBILITY OF WITNESS—INDIANS—SALE OF LIQUOR—EVIDENCE. In a prosecution for the sale of liquor to an Indian, the testimony of the Indian is not insufficient to support a verdict from the fact that he was in the employ of the government as an agent in the detection and prosecution of persons selling liquor to Indians. *State v. Rackich*..... 390
9. CRIMINAL LAW—TRIAL—RIGHT TO SEPARATE TRIAL—DEMAND. Under Rem. & Bal. Code, § 2161, providing that where defendants are jointly indicted, any defendant requiring it shall be separately tried, a demand for a separate trial is timely where the defendant's trial was set before his codefendant had been apprehended, and defendant demanded a separate trial as soon as it was known that there would be a joint trial. *State v. Moran*..... 588
10. CRIMINAL LAW—TRIAL—PRESENCE OF ACCUSED—NECESSITY—WAIVER OF RIGHT. Rem. & Bal. Code, § 2145, providing that no person punishable by death or imprisonment shall be tried unless personally present, does not, in cases not capital, preclude the entry of judgment upon a verdict, received in the absence of the defendant, if the defendant, out on bail, voluntarily absents himself without leave, for he thereby waives his right. *State ex rel. Gabe v. Main* 381
11. SAME—STATUTES—CONSTRUCTION. Upon the question of the necessity of the defendant's presence when the verdict is received, Rem. & Bal. Code, § 2196, providing that a defendant punishable by imprisonment must be personally present for the purpose of judgment, and if for fine only, he must be present or some responsible person must undertake for him to secure the payment controls § 2145, providing that no person shall be tried unless personally present. *State ex rel. Gabe v. Main*..... 381
12. SAME—PRESENCE OF ACCUSED—NECESSITY—ACQUITTAL. Under Rem. & Bal. Code, § 2196, providing that for the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present, and if for a fine only, he must be personally present or some responsible person must undertake for him to secure the payment, it is not necessary that a defendant out on bail be present upon receipt of a verdict of acquittal. *State ex rel. Gabe v. Main*..... 381
13. CRIMINAL LAW—TRIAL—SEVERAL OFFENSES—ELECTION—NECESSITY. In a prosecution for statutory rape upon a female of previous chaste character between fifteen and eighteen years of age, where the evidence tends to show three distinct offenses occurring at different times and places, it is reversible error for the court to deny defendant's motion, after the testimony is in, to compel the prosecution to

CRIMINAL LAW—CONTINUED.

- make an election as to the offense relied upon for conviction. *State v. Workman* 292
14. CRIMINAL LAW—TRIAL—ADJOURNMENT. Error cannot be predicated on the denial of a request to have the court and jury go to a witness confined to bed for the purpose of taking her testimony. *State v. Mallahan*..... 21
15. CRIMINAL LAW—EVIDENCE—REBUTTAL. Upon a prosecution for burglary, where defendant and one jointly indicted testified that they had no previous acquaintance, the state on rebuttal may show that they had been seen together prior to that time. *State v. Mallahan* 21
16. CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE—REBUTTAL. It is not an abuse of discretion to permit testimony on the part of the state in rebuttal which was cumulative of the state's evidence in chief, where it went but little beyond direct contradiction of the defendant's testimony of self-defense. *State v. Copeland*..... 243
17. CRIMINAL LAW—EVIDENCE—REBUTTAL EVIDENCE. On rebuttal, it is competent to show facts that would have been competent on the state's case in chief, where the specific matter was first gone into and denied on cross-examination of a witness for the defense. *State v. Stone* 625
18. CRIMINAL LAW—TRIAL—ISSUES, PROOF AND VARIANCE. In a prosecution for selling one quart of spirituous liquors to an Indian, it is not a material variance to prove the sale of one pint of such liquors. *State v. Rackich*..... 390
19. CRIMINAL LAW—TRIAL—INSTRUCTIONS. In a criminal prosecution, it is not error to reiterate instructions to the effect that the jury should free their minds from passion, prejudice and sympathy, and determine the case wholly upon the evidence without reference to the penalty. *State v. Harsted*..... 158
20. CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS. A reasonable doubt is properly defined as a substantial doubt having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such as arises from the evidence or want of evidence, and the absence of which would, after deliberation, enable one to have a settled and abiding conviction of guilt. *State v. Harsted*..... 158
21. CRIMINAL LAW—TRIAL—DEGREE OF OFFENSE—INSTRUCTIONS. In a prosecution for assault in the second degree, it is not error to refuse instructions as to third degree assault, when there was no evidence calling therefor. *State v. Harsted*..... 158
22. CRIMINAL LAW—TRIAL—INSTRUCTIONS. Upon an information for assault with intent to kill, it is not error to refuse to instruct as to assault and battery, where the evidence conclusively shows that de-

CRIMINAL LAW—CONTINUED.

- defendant was guilty of first or second degree assault or not at all. *State v. Copeland*..... 243
23. **CRIMINAL LAW—APPEAL—REVIEW—MISCONDUCT OF COUNSEL.** Error cannot be predicated upon remarks of the prosecuting attorney, made upon objecting to a motion in the presence of the jury, where no request was made to instruct the jury as to their effect. *State v. Mallahan* 21
24. **CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS—REQUESTS.** Error in failing to give instructions as to the right of self-defense cannot be urged in the absence of any request therefor. *State v. Bowinkelman* 396
25. **CRIMINAL LAW—APPEAL—REVIEW—WAIVER OF OBJECTION.** Where the accused withdrew objections to testimony expecting the answers to be favorable, he cannot predicate error thereon. *State v. Stone* 625
26. **CRIMINAL LAW—APPEAL—REVIEW—VERDICT.** A conviction for assault with a weapon likely to do bodily harm will not be disturbed on appeal on the ground that the assault was justified, where that depends upon the credibility of witnesses and the evidence was conflicting. *State v. Copeland*..... 243
27. **CRIMINAL LAW—APPEAL FROM JUSTICE COURT—COMPLAINT—AMENDMENT—HARMLESS ERROR.** On appeal from justice court, an order purporting to amend the complaint upon which the accused was tried in justice court, will not be held to deprive the accused of any substantial right, where the complaint had been amended in justice court by agreement before plea thereto, and accused was actually tried on the same charge as in the justice court, and the defendant pleaded not guilty after the so-called amendment. *State v. McKinney* 176
28. **CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR.** Error in excluding a question as to whether the defendant prevented a female from leaving a house of prostitution is cured by permitting her to answer whether any one had done so. *State v. Stone*..... 625
29. **CRIMINAL LAW—EXCESSIVE SENTENCE.** A sentence of not less than nine and not more than ten years for sodomy will not be interfered with as excessive, there appearing no gross abuse of discretion. *State v. Douglass*..... 71

CROSS-EXAMINATION:

See WITNESSES, 3, 5.

CUSTODY:

Of child, see DIVORCE, 6.

Final judgment of conviction as authority for custody and detention of prisoner, see ESCAPE, 1, 2.

DAMAGES:

For erroneous survey of lot, see **BOUNDARIES**, 3-5.

For wrongful ejection of passenger, see **CARRIERS**.

For breach of contract, see **CONTRACTS**, 2-4.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 3, 5-9.

Judgment for nominal damages as bar to subsequent action for substantial damages, see **JUDGMENT**, 6.

Injuries caused by public improvements, see **MUNICIPAL CORPORATIONS**, 2-5, 16, 17.

Breach by seller of contract for sale of goods, see **SALES**, 3.

Breach by vendor of contract for sale of land, see **VENDOR AND PURCHASER**, 6.

For increasing flow of surface water on lands of another, see **WATERS AND WATER COURSES**, 2.

In action for compensation and wrongful discharge, see **WORK AND LABOR**.

1. **DAMAGES—MEASURE—BREACH OF CONTRACT.** Upon breach of a contract to sell certain lambs, the measure of damages is the difference between the contract price and the value at the time of the agreed delivery. *Rothrock v. Hunter*..... 543
2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT—INJURY TO HAND.** A verdict for \$1,500 for the loss of a little finger, disfigurement and stiffening of the right hand, by the operator of a rip-saw, thirty-two years of age, is not so excessive as to indicate passion or prejudice. *Rommen v. Empire Furniture Mfg. Co.*..... 48
3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$6,900, reduced by the trial judge to \$4,500, will not be held excessive, where the plaintiff, a young man twenty years of age, lost all of the first three fingers of his right hand, and the fourth finger was injured and rendered useless. *King v. Page Lumber Co.*... 123
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$4,495.95 for injuries sustained by a carpenter through the fall of a gin pole is not excessive, where he suffered a compound fracture of the leg, which was shortened, he was confined to the hospital from April 6 to September 6, and suffers constant rheumatic pains; although he was able to go to work in January at four dollars a day, having formerly earned five dollars a day. *Martin v. Hill*.. 433

DEATH:

Admissibility of evidence as to cause of in prosecution for second degree assault, see **ASSAULT**, 2.

Of person struck by taxicab in city street, see **MUNICIPAL CORPORATIONS**, 26-28.

DEBT:

- Insufficient evidence to show agreement by corporation to pay debts of former partnership, see **CORPORATIONS**, 1.
- Limitation of school district indebtedness, see **SCHOOLS AND SCHOOL DISTRICTS**.

DECEDENTS:

- Estates, see **EXECUTORS AND ADMINISTRATORS**.

DECISIONS:

- Correct decision on erroneous ground, see **APPEAL AND ERROR**, 12.
- On appeal as law of case, see **APPEAL AND ERROR**, 41.

DECLARATIONS:

- As evidence in criminal prosecutions, see **CRIMINAL LAW**, 1.
- Filing declaration of homestead, see **HOMESTEAD**.
- Dying declarations, see **HOMICIDE**, 4.
- Construction of declaration of trust, see **TRUSTS**, 1.

DEEDS:

- Rights of grantee of owner after award in condemnation, see **EMINENT DOMAIN**, 8.
 - Vacation of, see **EXCHANGE OF PROPERTY**, 1.
 - By trustee of property in trust for husband, see **HUSBAND AND WIFE**, 1.
 - As indemnity mortgage, see **MORTGAGES**.
 - Foreclosure of trust deeds, venue, see **MORTGAGES**, 2.
 - Of state lands, see **PUBLIC LANDS**, 7, 8.
 - Subject and title of recording act, see **STATUTES**, 2.
 - Tax deeds, see **TAXATION**, 4.
 - To mortgagee of property held in trust, see **TRUSTS**, 1, 2.
 - Tender of by vendor, see **VENDOR AND PURCHASER**, 1.
1. **DEEDS—EXECUTION—FORGERY—EVIDENCE—SUFFICIENCY.** The forgery of a deed is sufficiently established where qualified experts compared the signatures with one proven to be genuine by a witness who saw the grantor sign, and were of the opinion that they were not written by the same person, and no attempt was made by the other parties to disclose the circumstances or explain the absence of the original deed. *O'Brien v. McKelvey*..... 18

DEFAULT:

- Of owners of property, in condemnation proceedings, see **EMINENT DOMAIN**, 7.
- Rescission by vendee while in default, see **VENDOR AND PURCHASER**, 5.

DEFECT:

- In appliances or methods of work, see **MASTER AND SERVANT**, 3, 4, 11, 12.

DEFINITENESS:

Of cross-complaint in action for divorce, see **DIVORCE**, 2.

DEGREES:

Duty to instruct as to lesser degrees of crime, see **CRIMINAL LAW**, 21, 22.

Of crime as question for jury, see **HOMICIDE**, 1.

Conviction of lesser degree of offense, see **INDICTMENT AND INFORMATION**, 2.

DELIVERY:

Of liquor in dry district in unbroken package, see **INTOXICATING LIQUORS**, 2.

To owner of duplicate statements of material furnished to contractor, see **MECHANICS' LIENS**.

DEMAND:

For separate trial, see **CRIMINAL LAW**, 9.

DEMURRER:

In pleading, see **PLEADING**, 2.

DENIALS:

In pleading, see **PLEADING**, 1.

DEPOSITS:

Indemnity deposit by partner as limitation of liability, see **INDEMNITY**.

DESCRIPTION:

Of land in complaint to quiet title, see **QUIETING TITLE**.

DESIGNATION:

Filing designation of firm, see **PARTNERSHIP**, 1, 2.

DILIGENCE:

In presenting checks for payment, see **BILLS AND NOTES**, 7.

In denying liability on notes procured by fraud, see **BILLS AND NOTES**, 10.

Want of as precluding right to continuance, see **CONTINUANCE**, 2.

In ascertaining newly discovered evidence, see **NEW TRIAL**, 5, 6.

DISCHARGE:

Of appeal bond by verdict of acquittal, see **BAIL**.

Revival of discharged debt, see **BANKRUPTCY**.

From indebtedness, see **COMPROMISE AND SETTLEMENT**.

Indemnity deposit as limitation of partner's liability, see **INDEMNITY**.

Of partner from liability, see **PARTNERSHIP**, 3.

DISCRETION OF COURT:

Review of orders granting or refusing new trial, see **APPEAL AND ERROR**, 17-19.

To grant continuance, see **CONTINUANCE**.

To grant new trial, see **NEW TRIAL**, 1, 2.

Cross-examination of witness, see **WITNESSES**, 3.

DISMISSAL AND NONSUIT:

Refusal of dismissal as prejudicial error, see **APPEAL AND ERROR**, 26.

Remand of decision reversing nonsuit, see **APPEAL AND ERROR**, 42.

Right to dismissal without prejudice in proceeding to register land under Torrens act, see **RECORDS**, 2.

At trial, see **TRIAL**, 4, 5.

DISSOLUTION:

Of partnership, see **PARTNERSHIP**, 3.

DISTRIBUTION:

Wrongful payment of award in condemnation proceedings, see **EMINENT DOMAIN**, 8.

DISTRICTS:

Assessment districts, see **MUNICIPAL CORPORATIONS**, 12.

DIVERSION:

Of surface waters in making street improvement, see **MUNICIPAL CORPORATIONS**, 3-5; **WATERS AND WATER COURSES**, 2.

DIVORCE:

Amendment of pleadings on appeal, see **APPEAL AND ERROR**, 16.

Validity of agreement to promote divorce suit, see **ATTORNEY AND CLIENT**, 5.

Liability of officer for false return, see **SHERIFFS AND CONSTABLES**.

1. **DIVORCE—GROUNDS—NONSUPPORT.** Under Rem. & Bal. Code, § 982, which names as ground for divorce, among others, abandonment for one year, and the neglect or refusal of the husband to make suitable provisions for his family, the two are in no way connected, and nonsupport need not have continued for one year prior to the commencement of the action; but the wife is entitled to divorce as a matter of law where, without fault on her part, nonsupport has continued for such a reasonable time as to show a settled intention to permanently refuse to support, and three months is sufficient. *Gariand v. Gariand* 236
2. **DIVORCE—CROSS-COMPLAINT — DEFINITENESS.** Plaintiff is not entitled to have a cross-complaint for a divorce made more definite and certain as to the times and places at which and with whom adultery was committed, where no direct charge of adultery is made, although adultery might be inferred from the facts stated. *Powell v. Powell* 561

DIVORCE—CONTINUED.

3. **DIVORCE—PLEADINGS—CROSS-COMPLAINT—RESIDENCE—JURISDICTION.** Where a complaint for divorce shows jurisdictional residence by the plaintiff, defendant's cross-complaint need not allege his residence in the county, nor in the state for one year preceding the commencement of the action, in order to give jurisdiction to grant a divorce upon the cross-complaint. *Powell v. Powell*..... 561
4. **DIVORCE—DECREE—DISPOSITION OF PROPERTY—VACATION—MISTAKE—MERITS OF APPLICATION.** A motion to vacate a decree of divorce in so far as it disposes of property rights, made on the ground of mistake and excusable neglect in presenting the case, is properly denied, where, after taking evidence and a full hearing, it appears that the former judgment was right and the moving party failed to substantiate her claims; any irregularities in the former proceeding being thereby cured. *Scammon v. Scammon*..... 217
5. **DIVORCE—DECREE—PROPERTY.** Where the property cannot be divided without loss, it is proper to award it to the husband, with alimony to the wife. *Powell v. Powell*..... 561
6. **DIVORCE—CUSTODY OF CHILD—MODIFICATION OF DECREE—EVIDENCE—SUFFICIENCY.** A judgment of divorce on the ground of cruelty of the husband, awarding the custody of a child, eight years old, to grandparents, with whom the wife was residing, should be modified so as to give the husband custody of the child where, nine months after the decree, the wife was adjudged insane and sent to an asylum, and the evidence shows that the husband had a suitable home and family and was in every way a proper person to have the custody of the child. *Morin v. Morin*..... 312
7. **DIVORCE—DECREE—COSTS—ATTORNEY'S FEES.** An attorney's fee of \$75 in a divorce case is not unreasonably inadequate. *Powell v. Powell* 561

DOCUMENTS:

Secondary evidence, see EVIDENCE, 3.

DURESS:

Participating in robbery because of, see HOMICIDE, 3.

DYING DECLARATIONS:

See HOMICIDE, 4.

EASEMENTS:

Assessment of for benefits from improvement, see MUNICIPAL CORPORATIONS, 8.

Priority of tax title over, see TAXATION, 1.

EJECTION:

Of passenger, see CARRIERS.

ELECTION:

Between offenses, see **CRIMINAL LAW**, 13.

ELECTIONS:

Clerk's certificate as evidence of result of local option election, see **INTOXICATING LIQUORS**, 3.

1. **ELECTIONS — OFFENSES — FALSE REGISTRATION — STATUTES — CONSTRUCTION.** A voter is not guilty of false registration in incorrectly stating his place of residence, when he did not register in the wrong precinct, under Rem. & Bal. Code, § 4768, defining false registration as the taking of a false oath, falsely personating another and procuring registration of the person as personated, misrepresenting his name or causing any name to be registred "otherwise than in the manner provided by the act;" in view of the fact that the matter of residence is not included in the oath nor among the acts specifically enumerated as constituting the criminal offense. *State v. Ross* 138

EMERGENCY:

Acts of servant in emergency, see **MASTER AND SERVANT**, 17.

EMINENT DOMAIN:

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 2, 12, 13, 16, 17.

1. **EMINENT DOMAIN — EVIDENCE — VALUE OF PROPERTY—OFFERS.** In eminent domain proceedings, upon an issue as to the value of the property, it is not admissible for the defendant to show offers made for the land. *North Coast R. Co. v. Newman*..... 374
2. **SAME.** In eminent domain proceedings, evidence of offers for the land is not made admissible on redirect examination by the fact that on cross-examination a witness had volunteered a statement as to offers which was struck out as not responsive to the question. *North Coast R. Co. v. Newman*..... 374
3. **EMINENT DOMAIN—DAMAGES—EVIDENCE — REBUTTAL EVIDENCE AS TO VALUES—ADMISSIBILITY.** In an action for damages to lots by the construction of a railway trestle in the street, where evidence was admitted to show diminished value for the use to which the property was adapted, evidence is admissible in rebuttal to show that such value would be increased rather than diminished, where announcement was made that it was not introduced for the purpose of offsetting benefits against damage. *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*..... 663
4. **EMINENT DOMAIN—JUDGMENT—CONCLUSIVENESS.** The judgment in condemnation proceedings concludes the parties and their privies as to all matters which were put in issue. *Casassa v. Seattle*... 146

EMINENT DOMAIN—CONTINUED.

5. EMINENT DOMAIN—DAMAGES—REGRADE OF STREET—SLOPE ON LOTS
—AWARD—RES JUDICATA—MATTERS CONCLUDED. In condemnation proceedings to regrade a street by making a deep cut and a slope of forty-five degrees on abutting property to meet the cut, an award of damages to the property covers only the damage to the lots arising from the cut in the street and the specified slope on the lots, and not damages for the removal of lateral support resulting from the fact that the nature of the soil was such that a slope of forty-five degrees was not sufficient to support the balance of the lot and prevent the remaining soil from falling into the street; and it is immaterial that the ordinance and petition required the condemnation of all lands and rights necessary to be taken, used, or damaged; since the city determined what slope was necessary and sufficient for lateral support, and that question will not be litigated in the condemnation proceedings. *Casassa v. Seattle*..... 146
6. EMINENT DOMAIN—DAMAGES TO PROPERTY—TRESTLE IN STREET. Where a railway trestle crossed a street diagonally, and did not touch the street in front of one of the lots of the plaintiff, damages to such lot cannot be recovered. *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*..... 663
7. EMINENT DOMAIN—AWARD OF DAMAGES—PARTIES ENTITLED—DECREE—DEFAULT OF TRUE OWNERS. In condemnation proceedings, when all persons interested in or claiming title to the land were duly served, and the true owners defaulted, and a trial of the issues was had between the relator and certain claimants, the relator is not charged with errors in determining who were the parties entitled to the award, and an award to such claimants and a decree adjudging that they are the true owners of the land is not void as to the relator, who acquired title to the land upon payment of the award to the clerk of the court, as provided by Rem. & Bal. Code, § 929. *Silverstone v. Harn*..... 440
8. SAME—PARTIES ENTITLED—GRANTEE OF OWNERS AFTER AWARD. The final decree in condemnation proceedings effects an involuntary sale of the land, and a subsequent deed by the owner conveys nothing; since the title was divested by the payment of the award and the subsequent deed did not operate as an assignment of the award, where it contained no apt words of assignment. *Silverstone v. Harn* 440
9. EMINENT DOMAIN—AWARD—WRONGFUL DISTRIBUTION—LIABILITY. Where, through error and the wrongful action of attorneys, an award in condemnation is adjudged to be paid to persons having no interest therein, and the payment was made and the judgment satisfied, the city as relator is not liable to the true owners of the property; since under Rem. & Bal. Code, § 7784, the payment of the award immediately vests the title in the city, and under Id., § 7778, the duty of making proper distribution is upon the court and not the city. *Carton v. Seattle*..... 447

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYMENT:

Acts of servant within scope of, see MASTER AND SERVANT, 27, 28.

EQUITY:

See QUIETING TITLE; SPECIFIC PERFORMANCE; TRUSTS.

Review in equitable actions, see APPEAL AND ERROR, 15.

Equitable estoppel, see ESTOPPEL.

Vacation of judgment, see JUDGMENT, 1, 2.

1. EQUITY—MAXIMS—LOSS BY INNOCENT PARTY. The maxim that where one of two innocent parties must suffer a loss by the act of a third person, the loss must fall upon the one whose act made the loss possible, applies as between a person claiming a lien on logs, who neglected to cash his check, and an innocent holder of the logs. *Hunt v. Panhandle Lumber Co.*..... 645

ESCAPE:

1. ESCAPE—ELEMENTS OF OFFENSE—COMMITMENT. Where one is in custody under a judgment of conviction of a felony, the judgment is sufficient as a commitment upon which to base an information for an attempt to escape jail. *State v. Workman*..... 658
2. ESCAPE—ATTEMPT—AUTHORITY FOR CUSTODY—FINAL JUDGMENT—COMMITMENT—NECESSITY. One imprisoned in the county jail after a final judgment of conviction and sentence authorizing his detention, is lawfully in custody and may be guilty of an attempt to escape jail, although the sheriff did not have in his possession any commitment or written evidence of authority to detain him; Rem. & Bal. Code, § 2207, merely providing that such a commitment shall be sufficient authority to the sheriff to execute sentence, not that it is essential. *State v. Hatfield*..... 9
3. ESCAPE—EVIDENCE—SUFFICIENCY. Evidence is sufficient to establish an attempt to escape jail by force, where it appears that the defendant was confined in the county jail under conviction and sentence, that he had concealed and in his possession saws suitable for cutting iron or steel, that a short time before he counseled escape with other prisoners, and that he guarded the door of his cell while a bolt was being heated and sawed by another prisoner in his cell. *State v. Hatfield*..... 9

ESTABLISHMENT:

Of boundary, see BOUNDARIES.

Of trusts, see TRUSTS, 2, 3.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Trusts, see TRUSTS.

ESTOPPEL:

To allege error, see **APPEAL AND ERROR**, 14.

To assert defense of fraud, see **BILLS AND NOTES**, 10.

To assert title to land, see **BOUNDARIES**, 1.

By judgment, see **JUDGMENT**, 3-6.

Jurisdiction by to levy assessment on lands outside city limits, see **MUNICIPAL CORPORATIONS**, 7.

To hold sheriff liable for false return of service, see **SHERIFFS AND CONSTABLES**.

1. **ESTOPPEL—MISTAKE—PREJUDICE.** Upon an issue as to the release of one partner from liability on a partnership contract, the fact that both parties to the contract took it for granted that the withdrawal and assignment of one partner *ipso facto* worked a release, does not amount to a release by way of estoppel, where the performance of the contract was continued the same as before and nothing was done to mislead the retiring partner to his disadvantage. *Western Lumber & Pole Co. v. Joslyn*..... 524
2. **ESTOPPEL—BOUNDARIES—ACQUIESCENCE IN IMPROVEMENTS.** The vendor is estopped to recover possession of land within an enclosure shown to the vendee as the boundary line, where no survey was made and no protest was made while the vendee went into possession, cultivated the land up to the line, and erected near the line on the land in dispute a dwelling costing \$7,000. *Windsor v. Sarsfield* 576
3. **ESTOPPEL—EVIDENCE—PRESUMPTIONS AND BURDEN OF PROOF.** The rule that evidence to sustain an estoppel to claim land must be clear and convincing does not apply where the conduct of the parties is not relied upon to overcome a writing, and the evidence on both sides is of the same kind. *Windsor v. Sarsfield*..... 576
4. **ESTOPPEL—AGAINST STATE—PLEADING.** In an action by the state to recover possession of part of a school section, homesteaded by the defendant, an answer alleging allowance of defendant's homestead application and that he had made improvements on the land with the knowledge and consent of the state, is insufficient to support an estoppel against the state. *State v. Whitney*..... 473

EVIDENCE:

See **HOMICIDE**, 1, 4; **NEGLIGENCE**; **PAYMENT**; **SODOMY**; **WITNESSES**.

Incorporation in record on appeal, see **APPEAL AND ERROR**, 7-9, 11.

Presumptions on appeal, see **APPEAL AND ERROR**, 24.

Review, harmless error in rulings on, see **APPEAL AND ERROR**, 30-35.

In prosecution for assault, see **ASSAULT**, 2.

Of fraud in procuring note, see **BILLS AND NOTES**, 8-10.

Location of boundary, see **BOUNDARIES**, 1.

Of negligent survey of lot, see **BOUNDARIES**, 5.

To identify property, see **BURGLARY**.

Contempt proceedings, see **CONTEMPT**, 3.

EVIDENCE—CONTINUED.

Of agreement by corporation to pay debts of former partnership, see **CORPORATIONS**, 1.

To show consideration for corporate contract, see **CORPORATIONS**, 2.

Authority of corporate agent, see **CORPORATIONS**, 4.

In criminal prosecutions, see **CRIMINAL LAW**, 1-3, 15-18, 25, 28.

Harmless error in exclusion of, see **CRIMINAL LAW**, 28.

To show forgery of deed, see **DEEDS**.

To show grounds for modification of decree as to custody of child, see **DIVORCE**, 6.

Condemnation proceedings, see **EMINENT DOMAIN**, 1-3.

Of attempt to escape jail, see **ESCAPE**, 3.

To sustain estoppel, see **ESTOPPEL**, 3.

Of fraud and failure of consideration upon trade of property, see **EXCHANGE OF PROPERTY**.

Of fraud and want of personal notice at execution sale, see **EXECUTION**, 1.

Negligent sale of explosive, see **EXPLOSIVES**.

Of fraud, see **FRAUD**.

To prove result of local option election, see **INTOXICATING LIQUORS**, 3.

Of sale of liquor in violation of local option law, see **INTOXICATING LIQUORS**, 5, 6.

For injuries to servant in general, see **MASTER AND SERVANT**, 4, 18, 19, 23, 28, 29.

Of benefits from public improvement, see **MUNICIPAL CORPORATIONS**, 19, 20.

Negligence of driver of taxicab in running down pedestrian, see **MUNICIPAL CORPORATIONS**, 26.

Newly discovered as ground for new trial, see **NEW TRIAL**, 5, 6.

Release of partner, see **PARTNERSHIP**, 3.

In prosecution for placing female in house of prostitution, see **PROSTITUTION**, 2-4.

In prosecution for rape, see **RAPE**.

Identity of buyer, see **SALES**, 2.

Value of property on breach of contract, see **SALES**, 3.

Instructions as to, see **TRIAL**, 1.

On motion for nonsuit, see **TRIAL**, 4, 5.

Establishment of trust, see **TRUSTS**, 3.

Parol to explain terms of trust, see **TRUSTS**, 5.

For breach of contract, see **VENDOR AND PURCHASER**, 2.

1. **EVIDENCE—JUDICIAL NOTICE.** The courts take judicial notice of the rules and practice of the Interior Department. *Adams v. Canutt* 422
2. **EVIDENCE—HEARSAY—PARENTAGE—INDIANS—SALE OF LIQUOR.** Upon a prosecution for selling liquor to an Indian of the half blood, the Indian is competent to testify as to his parentage, even though his parents are living. *State v. Rackich* 390

EVIDENCE—CONTINUED.

3. **EVIDENCE—LETTERS—COPIES.** Copies of letters are inadmissible where there was no attempt to procure the production of the originals. *Seattle Automobile Co. v. Stimson*..... 548
4. **EVIDENCE—WRITTEN CONTRACT—ADMISSIBILITY OF PAROL EVIDENCE—CONSTRUCTION BY PARTIES—CONTEMPORANEOUS AGREEMENT.** A written contract for the sale of a steam shovel f. o. b. at Toledo, Ohio, to be set up, demonstrated and guaranteed, at Seattle, Washington, which provided that the buyer was to pay all expenses of unloading, installing and operating the shovel for demonstration, except the expenses of an engineer, and that if the shovel was not up to guarantee, the seller would refund whatever payment it had received, is not clear and certain as to which party was to pay the cost of freight if the shovel was not as guaranteed; and accordingly it is admissible to show that, before the parties signed the contract, the seller wrote a letter to its agents, which was shown to the buyer, representing that the freight charges would be refunded in case the shovel was not as guaranteed. *Steenstrup v. Toledo Foundry & Machine Co.* 101
5. **EVIDENCE—PAROL—TO EXPLAIN WRITING—ADMISSIBILITY.** Parol evidence is admissible to explain the intent and purpose of the parties in making interlineations and material alterations in a written contract prior to its execution, even though it contradicts the written contract. *Titus v. Titus*..... 345
6. **EVIDENCE—EXPERTS—HANDWRITING—QUALIFICATION OF EXPERTS.** Employees in the county auditor's office are qualified as experts to compare signatures and give an opinion as to whether they were written by the same person, where one of them had had experience in inspecting instruments and signatures thereto offered for record, and the other was a clerk and bookkeeper who had been a receiving and paying teller in a bank. *O'Brien v. McKelvey*..... 18

EXAMINATION:

Of witnesses in general, see **WITNESSES**.

EXCEPTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 1-4, 24.
 Bill of as part of record on appeal, see **APPEAL AND ERROR**, 7, 9, 11.
 Necessity for purpose of reviewing error in examination of witness, see **WITNESSES**, 3.

EXCESSIVE DAMAGES:

See **DAMAGES**, 2-4.
 For wrongful ejection of passenger, see **CARRIERS**, 2.

EXCHANGE OF PROPERTY:

1. **EXCHANGE OF PROPERTY—RESCISSION—FAILURE OF CONSIDERATION—EVIDENCE—SUFFICIENCY.** There is a failure of consideration for the exchange of property, warranting a rescission and an action to set aside plaintiff's deed, where defendants agreed to transfer a lease of an apartment house, requiring the written consent of the landlord to the transfer, and defendants failed to secure the landlord's consent or to make any effective assignment; and where the defendants agreed to transfer by a bill of sale the furnishings and good will of the business, which was presumptively community property, and the bill of sale therefor was executed by the wife alone without the husband joining therein. *Blum v. Smith*..... 192
2. **SAME—FRAUD—EVIDENCE—SUFFICIENCY.** The vendee of a lodging house lease and furniture is not estopped from rescinding an exchange of property therefor by relying on representations that the vendors were owners of the lease and could transfer a good title thereto, and that the house and tenants were of desirable class, where gross fraud was committed and active steps taken to mislead. *Blum v. Smith*..... 192

EXCLUSION:

Of witnesses, see **TRIAL**, 2.

EXCUSE:

For failure to present checks, see **BILLS AND NOTES**, 7.

For failure to deliver duplicate statements of material to owner, see **MECHANICS' LIENS**, 10, 12.

EXECUTION:

Forgery of signature to deed, see **DEEDS**.

Exemptions, see **HOMESTEAD**.

Conclusiveness of judgment in action to set aside judgment and sale, see **JUDGMENT**, 4.

1. **EXECUTION—SALE—VACATION—FRAUD—EVIDENCE—SUFFICIENCY—PERSONAL NOTICE.** An execution sale will not be set aside two years after the sale on the allegations of want of personal notice and fraud, where it appears that the judgment debtor had notice that the plaintiff intended to and would issue execution and sell the property if the judgment was not paid, and the altercation which took place shows that there could have been no deception; personal notice of the sale not being required by Rem. & Bal. Code, § 582. *Johnson v. Johnson*..... 113
2. **EXECUTION—SALE—VACATION—INADEQUACY OF PRICE.** An execution sale of property of the value of \$1,000, to satisfy a judgment of \$195.50, will not be set aside on the sole ground of inadequacy of price, the sale having been made at public auction on due notice and no fiduciary relation existing or circumstances proven showing unfairness. *Johnson v. Johnson*..... 113

EXECUTION—CONTINUED.

3. **EXECUTION—SALE—PURCHASE BY ATTORNEY.** The attorney for the adversary may bid in property of the judgment debtor upon execution sale the same as though he were a stranger. *Johnson v. Johnson* 118

EXECUTORS AND ADMINISTRATORS:

Order in probate setting aside homestead to widow from community property, see **HUSBAND AND WIFE**, 3.

Finality of order in probate setting aside homestead to widow, see **JUDGMENT**, 5.

Action by administrator for receiver of life estate, see **LIFE ESTATES**.

1. **EXECUTORS AND ADMINISTRATORS—HOMESTEAD FOR WIDOW—APPRAISAL AND ORDER—NOTICE—JURISDICTION—JUDGMENT—CONCLUSIVENESS.** Under Rem. & Bal. Code, §§ 1465, 1466, making it the duty of the probate court when certain facts appear to set aside a homestead of a specified value for the care and support of the widow and children, which homestead shall not be assets in the hands of the administrator, an order appraising and setting aside a homestead upon the widow's petition, filed in the probate case, is a proceeding within the administration of the estate requiring no personal service upon the administrator as in the case of an original proceeding; but notice to the attorney authorized to represent the administrator in the administration of the estate confers jurisdiction to make the appraisement and order, which is final and conclusive, if not resisted. *Fairfax v. Walters*..... 583
2. **EXECUTORS AND ADMINISTRATORS—ACTIONS—LIMITATIONS—REJECTION OF CLAIM.** An action not being commenced so as to toll the statute of limitations until the complaint is filed, an action upon a claim against an estate which was rejected January 2, is not commenced within three months thereafter, as required by Rem. & Bal. Code, § 1477, when the complaint was not filed until April 6, following. *Farmers & Merchants Bank v. Lilly*..... 309
3. **SAME—DATE OF REJECTION—NOTICE.** Where a claim against an estate was rejected January 2, because not filed within one year, and on solicitation of the claimant seeking a reconsideration, the administrator took the matter up with his attorneys, and wrote on January 20th that the attorneys' "position is the same as mine—that I cannot allow the claim," the claimant was not misled or prejudiced in bringing an action within three months from the rejection of the claim, which dates from January 2, and not January 20. *Farmers & Merchants Bank v. Lilly*..... 309

EXEMPTIONS:

See **HOMESTEAD**.

EXPENSES:

Apportionment of for public improvement, see MUNICIPAL CORPORATIONS, 12-14.

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 6.

EXPLOSIVES:

Effect of verdict exonerating codefendant in action for damages from blasting, see TRIAL, 7.

1. **EXPLOSIVES — NEGLIGENT SALE—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.** In an action for injuries sustained by one purchasing "Jexite," a white powder containing no picric acid, alleged to be highly explosive and dangerous, a recovery cannot be sustained on the testimony of a chemist as to experiments made by him with a powder called "Jexite," which it appears was a yellow powder containing picric acid and entirely different ingredients from the powder sold, and which had been used only in the experimental stage and was not on the market commercially. *Nelson v. Sibley Contracting Co.* 471

FACTORY ACT:

Duty to guard machinery, see MASTER AND SERVANT, 2.

FEES:

Of attorney, see ATTORNEY AND CLIENT; DIVORCE, 7.

FELLOW SERVANTS:

See MASTER AND SERVANT, 6-10.

FILING:

Amendment of defects by filing new bond, see APPEAL AND ERROR, 6.

Of chattel mortgage, see CHATTEL MORTGAGES, 1.

Declaration of homestead, see HOMESTEAD.

Designation of firm, see PARTNERSHIP, 1, 2.

FINDINGS:

Necessity of exceptions for purpose of review, see APPEAL AND ERROR, 2, 4.

Review on appeal, see APPEAL AND ERROR, 22-24, 40.

FINES:

Assessment of in contempt proceeding, see CONTEMPT, 4.

FORECLOSURE:

Of lien, see MECHANICS' LIENS.

Of tax lien, see TAXATION.

FORFEITURE:

Verdict of acquittal as relief from forfeiture of appeal bond, see

BAIL.

Of contract for sale of land, see VENDOR AND PURCHASER, 1, 5.

FORGERY:

Of deed, see DEEDS.

FORMER ADJUDICATION:

See JUDGMENT, 3-6.

FRANCHISE:

Assessment of railway franchise, see MUNICIPAL CORPORATIONS, 8, 9.

FRAUD:

See BILLS AND NOTES, 8-10.

Conveyances in fraud of creditors, see CHATTEL MORTGAGES, 2.

In transaction involving exchange of property, see EXCHANGE OF PROPERTY, 2.

As vacating execution sale, see EXECUTION, 1.

Sales of realty, see VENDOR AND PURCHASER, 4, 5.

1. FRAUD—EVIDENCE—SUFFICIENCY. Actionable fraud on the part of the vendee in the sale of a steamboat is sufficiently established, where there was evidence that the vendee induced the vendors to take in part payment an assignment of a fictitious land contract, guaranteeing that \$4,000 of the purchase money had been paid thereon, making representations well calculated to deceive and upon which the vendors relied, inquiry being prevented by the vendee's artifice. *McMillen v. Hillman*..... 27

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—SALE OF LAND—BY AGENT. Verbal authority to find a purchaser for land does not authorize the agent to execute a binding contract of sale. *McLeod v. Morrison & Eshelman*... 683

FRAUDULENT CONVEYANCES:

By mortgagor of chattels, see CHATTEL MORTGAGES, 2.

FROGS:

Duty of railroad to guard, see RAILROADS.

GENERAL APPEARANCE:

See APPEARANCE.

GIFTS:

Of liquor in dry unit, see INTOXICATING LIQUORS, 1.

GOOD FAITH:

Of purchaser, see BILLS AND NOTES, 5, 6, 8.

GRANTS:

Of school lands, see **PUBLIC LANDS**, 4-6.

GUARANTY:

See **INDEMNITY; PRINCIPAL AND SURETY**.

Promise to pay note as barred by limitation, see **LIMITATION OF ACTIONS**.

1. **GUARANTY—PROMISE TO PAY DEBT OF ANOTHER—CONSIDERATION.**
An oral guaranty of a note turned over in payment of the guarantor's indebtedness is a sufficient consideration for a subsequent written guaranty of its payment, as it is but an agreement to pay his own debt. *Ekre v. Cain*..... 659

GUARDIAN AND WARD:

Guardian *ad litem*, see **INFANTS**.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 25-40.

In criminal prosecution, see **CRIMINAL LAW**, 27, 28.

HEARSAY EVIDENCE:

In civil actions, see **EVIDENCE**, 2.

In criminal prosecution, see **HOMICIDE**, 4.

HOMESTEAD:

Appraising and setting aside for widow, see **EXECUTORS AND ADMINISTRATORS**, 1.

Setting aside homestead to widow from community property, see **HUSBAND AND WIFE**, 3.

Finality of order setting aside homestead to widow, see **JUDGMENT**, 5.
Relinquishment of, see **PUBLIC LANDS**, 1, 2.

1. **HOMESTEAD—EXEMPTIONS—EXECUTION—TIME FOR FILING DECLARATION.** Under Rem. & Bal. Code, §§ 532, 533, exempting a homestead from execution sale, except for judgments obtained on debts secured by mechanics' and vendor's liens and mortgages executed by husband and wife, an execution sale cannot be had upon a judgment entered upon unsecured promissory notes, where prior to the issuance of the execution, a declaration of homestead had been filed, although the judgment was entered prior to the filing of the declaration and became a lien subject to be defeated by such filing. *Snelling v. Butler*..... 165

HOMICIDE:

Declarations of codefendant as evidence, see **CRIMINAL LAW**, 1.

1. **HOMICIDE—MANSLAUGHTER—DEFINITION—EVIDENCE—QUESTION FOR JURY.** Under Rem. & Bal. Code, § 2395, defining manslaughter in broad terms as including all homicides other than those specified in *Id.*, §§ 2392, 2393 and 2394, the court cannot determine the degree

HOMICIDE—CONTINUED.

and decide, as a matter of law, that the defendant was necessarily guilty of one of the higher degrees, where it appears that defendant was having a dispute with the deceased over a fence; called his attention to the gun carried by defendant's daughter who evidently heard the remark and who had made threats against the deceased; since defendant's guilt did not depend entirely on the presence or absence of design on her part, the same being a question for the jury. *State v. Beebe*..... 463

2. **HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.** Under Rem. & Bal. Code, § 2406, defining justifiable homicide in self-defense where there is reasonable ground to apprehend great personal injury etc., it is not error against the defendant to instruct as to the right of self-defense "if the defendant believes and has reasonable ground to believe" that the killing was necessary to protect himself from great personal danger; as the instruction is more liberal to the defendant than the law, and the "reasonable ground to apprehend" must be such as to produce an honest belief of the existence of danger. *State v. Bowinkelman* 396

3. **HOMICIDE—JUSTIFIABLE HOMICIDE—DEFENSE OF DURESS—INSTRUCTIONS—KILLING IN COMMISSION OF ROBBERY.** Upon the defense that accused participated in a robbery because of duress, it is not error to instruct that, on a resulting murder, there was no question of justifiable or excusable homicide, where the accused had participated in the robbery and the victim was murdered by a confederate in committing the robbery; in view of Rem. & Bal. Code, § 2392, subd. 3, defining murder in the first degree as a killing without design to effect death by a person engaged in the commission of a robbery etc. *State v. Moretti*..... 537

4. **HOMICIDE—EVIDENCE—DYING DECLARATIONS—DECLARATION OF CO-CONSPIRATORS.** Upon a prosecution for the murder of a policeman, shot while attempting to arrest the accused and his companion or co-conspirator, who was killed in the melee, the dying declaration of the co-conspirator is not admissible in evidence, where the declaration was a mere narrative of past events; since it was not made during the existence or in furtherance of the conspiracy, and was hearsay. *State v. Nist*..... 55

HUSBAND AND WIFE:

See DIVORCE.

Rights of widow to homestead, see EXECUTORS AND ADMINISTRATORS, 1.

1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—TITLE IN TRUST—DEED OF TRUSTEE.** The title to land agreed to be conveyed to a builder in part consideration for his work, does not pass to the community consisting of himself and wife, before deed; and being held in trust, the deed of the trustee at request of the husband passes

HUSBAND AND WIFE—CONTINUED.

title without any conveyance by the wife. *Empire State Surety Co. v. Ballou*..... 76

2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—PRESUMPTION.** Under the presumption that property acquired after marriage is community property, and in the absence of evidence that personal property was the separate property of the wife, her bill of sale thereof is a nullity, under Rem. & Bal. Code, § 5917, giving the husband sole management and control of community personalty. *Blum v. Smith* 192
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—EXECUTORS AND ADMINISTRATORS—HOMESTEAD FOR WIDOW—TITLE CONFERRED—STATUTES.** Under Rem. & Bal. Code, §§ 1465, 1466, authorizing the probate court to set aside a homestead for the support of the widow and children, if none was selected by the deceased in his life, which homestead shall be exempt from debts and not treated as assets of the estate, an order setting aside to the widow a homestead from community property vests in her the title in fee, if the court had jurisdiction to make the order. *Fairfax v. Walters*..... 583
4. **HUSBAND AND WIFE—SEPARATION AGREEMENT—CONSTRUCTION.** A separation agreement, whereby the husband agreed to pay the wife \$3,000 in monthly installments for the support, maintenance and education of their two children upon condition that the children be kept in school and continue their education during said period, and in the event of their failing to continue their attendance at school, the payments to cease, should be construed to require attendance at school only until their education, as contemplated by the parties at the time, is completed; and where they graduated from college before the end of the period, the wife is entitled to recover the whole sum, without further attendance in school by the children. *Titus v. Titus* 345
5. **HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—ACTIONS—ACCRUAL—LIMITATIONS.** An action for alienation of affections of a husband is not commenced within three years from the time of the accrual of the action, and is therefore barred, where the plaintiff separated from her husband more than three years before the action was commenced, any anything said or done by the defendants to alienate the husband's affections occurred prior to that time. *Mullins v. Mullins* 351

IDENTITY:

Evidence to identify stolen property, see **BURGLARY**.
Of buyer, see **SALES**, 2.

IMPEACHMENT:

Of verdict, see **NEW TRIAL**, 3.
Of witness, see **WITNESSES**, 4-7.

IMPORTATION:

Of liquor in unbroken package, see **INTOXICATING LIQUORS**, 2.

IMPRISONMENT:

Escape of prisoner, see **ESCAPE**.

IMPROVEMENTS:

Public improvements, see **MUNICIPAL CORPORATIONS**, 1-25.

1. **IMPROVEMENTS—LIABILITY—BREACH OF CONTRACT.** Upon breach of an oral contract to convey lands to another placed in his possession, the owner of the lands is liable for the value of improvements placed thereon, over and above the value of the rents and profits while occupied. *Ernst v. Schmidt*..... 452

INCONSISTENT DEFENSES:

See **PLEADING**, 1.

INDEMNITY:

Consideration for indemnity mortgage, see **MORTGAGES**, 1.

Right of surety to first exhaust indemnity of principals, see **PRINCIPAL AND SURETY**.

1. **INDEMNITY—LIABILITY—DISCHARGE—PARTNERS AS PRINCIPALS—DEPOSIT AS LIMITATION ON LIABILITY.** Where a surety company guaranteed the construction of a building by a copartnership, taking as indemnity a deposit of \$1,000 in money from one of the partners, his liability is not limited to the deposit, as all the partners are liable as principals; hence use of the deposit to discharge claims does not release the partner making the deposit from further liability. *Empire State Surety Co. v. Ballou*..... 76

INDEPENDENT CONTRACTORS:

See **MASTER AND SERVANT**, 29, 30.

INDIANS:

Evidence in prosecution for selling liquor to, see **CRIMINAL LAW**, 8.
Hearsay evidence as to parentage in prosecution for sale of liquor to Indian, see **EVIDENCE**, 2.

INDICTMENT AND INFORMATION:

See **BRIBERY**, 2.

In prosecution for assault with intent to commit sodomy, see **ASSAULT**, 1.

1. **INDICTMENT AND INFORMATION—VERIFICATION—WAIVER OF OBJECTION.** The objection that an information was not reverified after it was amended is waived where the defendant demurred to the amended information and was later arraigned and pleaded not

INDICTMENT AND INFORMATION—CONTINUED.

gully without raising the objection as to the verification until after verdict. *State v. Stone*..... 625

2. INDICTMENT AND INFORMATION—DEGREES OF OFFENSE—FIRST AND SECOND DEGREE ASSAULTS—STATUTES. A conviction of assault with a weapon likely to produce bodily harm, within Rem. & Bal. Code, § 2414, subd. 4, may be had under an information charging an assault with a shot gun by shooting with intent to kill, under Id., § 2413, subd. 1; as the former is necessarily included within the latter, within the requirements of Id., § 2168. *State v. Copeland*. 243

INFANTS:

Custody and support on divorce of parents, see DIVORCE, 6.

1. INFANTS—RIGHT TO SUE—GUARDIAN AD LITEM—APPOINTMENT. The court should, at any stage of the proceedings, appoint a guardian *ad litem* for infant parties, whenever their minority is made to appear. *Kongsbach v. Casey*..... 643

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INJUNCTION:

Violation of injunctive order, see CONTEMPT.

Rights of minority stockholders to enjoin sale of entire corporate property, see CORPORATIONS, 8.

INSOLVENCY:

See BANKRUPTCY.

INSTRUCTIONS:

Review as dependent on exceptions in lower court, see APPEAL AND ERROR, 1, 3.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 25, 36-39.

In criminal prosecutions, see CRIMINAL LAW, 19-22, 24; HOMICIDE, 2, 3.

In civil actions, see TRIAL, 1, 6.

INTENT:

Assault with intent to commit sodomy, see ASSAULT, 1.

INTEREST:

Including in assessment for local improvement, see MUNICIPAL CORPORATIONS, 15.

INTERROGATORIES:

Failure to answer as ground for continuance, see CONTINUANCE, 3.

INTOXICATING LIQUORS:

Evidence in prosecution for sale to Indian, see **CRIMINAL LAW**, 8.

Competency of witness to testify as to parentage in prosecution for sale of liquor to Indian, see **EVIDENCE**, 2.

Subject and title of local option act, see **STATUTES**, 1.

1. **INTOXICATING LIQUORS—LOCAL OPTION—OFFENSES—GIFTS IN STREET—STATUTES—CONSTRUCTION.** The giving away of liquor on the streets of a town within a dry unit is a violation of the local option law of 1909, Rem. & Bal. Code, § 6300, providing that it shall be unlawful to sell or give away any intoxicating liquor within the limits of the unit, provided the words "give away" shall not prohibit the giving of liquor to guests in a private house; notwithstanding the further provision of Id., § 6303, aimed at gifts by dealers for the obvious purpose of evading the penalties against sales. *State v. Jones* 229
2. **INTOXICATING LIQUORS—LOCAL OPTION—IMPORTATION—"UNBROKEN PACKAGES."** A demijohn of whiskey, drawn from a barrel by a wholesale dealer within a wet district, and brought into, and delivered to a customer in, a dry district, is an "unbroken package," within the meaning of the local option law, Rem. & Bal. Code, § 6309, which provides that the act shall not apply to deliveries of unbroken packages at residences which are not places of business or public resort, by wholesalers in their own conveyances or by common carrier. *State v. Maire*..... 591
3. **INTOXICATING LIQUORS—OFFENSES—ILLEGAL SALES—LOCAL OPTION—ELECTION—EVIDENCE—CLERK'S CERTIFICATE—ADMISSIBILITY.** Under Rem. & Bal. Code, § 6297, providing that the result of a local option election may be proved by the clerk's record of the official canvass or by the "official certificate" of the clerk, the clerk's certificate reciting the final result is sufficient and admissible, without a certified copy of the details of the canvass. *State v. Polk*..... 411
4. **SAME—ILLEGAL SALES—DEFENSES—INSTRUCTIONS.** In a prosecution for selling liquor in dry territory in violation of the local option laws, it is not error to refuse to give instructions as to defendant's right to sell liquor as a physician, where there was no evidence of such right or any justification for the sale. *State v. Polk*..... 411
5. **SAME—ILLEGAL SALES—EVIDENCE—SUFFICIENCY.** The clerk's certificate required by Rem. & Bal. Code, § 6297, is sufficient *prima facie* evidence that local option was in force in the precinct. *State v. Polk* 411
6. **SAME—ILLEGAL SALES—EVIDENCE OF SALES—SUFFICIENCY.** The uncontradicted statement of one witness that a sale of liquor was made in a town in dry territory, is sufficient to support a conviction of selling liquor in violation of the local option law, although the exact place or boundaries of the town were not shown. *State v. Polk*. 411

JOINT TORT FEASORS:

Effect of verdict in favor of codefendant, see TRIAL, 7.

JUDGES:

Misconduct as harmless error, see APPEAL AND ERROR, 28.

Mandamus to judge, see MANDAMUS, 1, 2.

JUDGMENT:

Review, see APPEAL AND ERROR.

Disobedience of as contempt, see CONTEMPT.

Condemnation proceedings, see EMINENT DOMAIN, 4, 5, 7-9.

Sufficiency as commitment, see ESCAPE, 1, 2.

Conclusiveness of appraisalment and order setting aside homestead for widow, see EXECUTORS AND ADMINISTRATORS, 1.

Mandamus to compel entry of, see MANDAMUS, 1, 2.

1. JUDGMENT—VACATION—JURISDICTION—AFFIDAVIT OF MERITS. A motion to vacate a judgment void for want of jurisdiction need not be supported by an affidavit of merits. *Sakai v. Keeley*..... 172
2. JUDGMENT—ACTION TO VACATE—NECESSARY PARTIES—DEFENDANTS—PURCHASERS. Where property was attached and sold under a judgment alleged to be fraudulent and void, the purchasers at the sale are indispensable parties to an equitable action to set aside and vacate the judgment. *Peterson v. Wheeler*..... 519
3. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—WATERS—RIPARIAN RIGHTS. Where a lower riparian owner brought an action claiming forty inches of the flow of a creek, and was adjudged the prior right to use but nine inches, as the "reasonable portion" of the waters belonging to him, the judgment is *res judicata* and a bar to a second action brought against the same parties to determine his rights to the waters as a riparian owner. *Farwell v. Brisson*... 305
4. JUDGMENT—RES JUDICATA—PARTIES AND PRIVIES. In an action by grantees acting merely as trustees of judgment debtors, brought against the purchasers of the property at execution sale to set aside the judgment and sale as fraudulent and void, a judgment quieting the title of the purchasers is *res judicata* as far as the title to the property is concerned, and bars a subsequent action by the judgment debtors against the judgment creditors to set aside the judgment, which was satisfied by the execution sale. *Peterson v. Wheeler*. 519
5. JUDGMENTS—CONCLUSIVENESS—FINALITY. An order in probate setting aside a homestead to a widow is *res adjudicata*, if the court had jurisdiction and the administrator appeared or had sufficient notice to appear and try out the question. *Fairfax v. Walters*..... 583
6. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED—CAUSES ARISING SUBSEQUENTLY. In an action for breach of covenant against incum-

JUDGMENT—CONTINUED.

branches, where the plaintiff failed to allege either an eviction or a discharge of the incumbrances, and the court instructed the jury that they could award nominal damages only, and refused leave to file a supplemental complaint showing an eviction subsequent to the commencement of the action because it was not timely made, judgment for nominal damages is *res judicata* and a bar to a subsequent action for substantial damages by reason of the eviction, where plaintiff, instead of dismissing the former action before the judgment for nominal damages, appealed therefrom to the supreme court and sought its reversal. *International Development Co. v. Clemans* 620

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

JUDICIAL SALES:

On execution, see EXECUTION.

JURISDICTION:

In contempt proceedings, see CONTEMPT, 2, 4.

Allegations of cross-complaint as to residence of defendant, see DIVORCE, 3.

To make appraisement and order setting aside homestead to widow, see EXECUTORS AND ADMINISTRATORS, 1.

Foreclosure, see MORTGAGES, 2.

Limit of in making assessment, see MUNICIPAL CORPORATIONS, 6, 7.

Of court in proceeding to register land under Torrens act, see RECORDS, 2.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 19-22, 24.

Disqualification or misconduct ground for new trial, see NEW TRIAL, 3, 4.

Instructions in civil actions, see TRIAL, 1, 6.

Verdict in civil actions, see TRIAL, 7.

JUSTIFICATION:

Of homicide, see HOMICIDE, 3.

KNOWLEDGE:

As affecting negligence of employee, see MASTER AND SERVANT, 15.

LACHES:

In presenting checks for amount of claims, see LOGS AND LOGGING, 2.

As defense to specific performance of contract, see SPECIFIC PERFORMANCE, 1.

LANDLORD AND TENANT:

1. **LANDLORD AND TENANT—LEASE—SALOON PREMISES—TERMINATION—ADOPTION OF LOCAL OPTION.** The adoption of local option prohibiting the sale of liquors in a town does not terminate a lease of premises used for a saloon, or relieve the lessee from the payment of rent, where the lease merely provided that the lessee may conduct a saloon on the premises in conformity to the ordinances of the town and the laws of the state then in force or thereafter enacted; since it is merely permissive and not restrictive as to the uses to which the property may be put. *Hayton v. Seattle Brewing & Malting Co.* 248
2. **LANDLORD AND TENANT—RENT—LIABILITY OF ASSIGNEE AFTER RE-ASSIGNMENT.** The assignee of a lease, under an unqualified consent by the lessor, may reassign the lease for the purpose of ridding herself of liability to the lessor for rent accruing thereafter, although she had agreed with the original lessee on accepting the assignment to perform all the covenants and obligations in the lease. *Harvard Investment Co. v. Smith*..... 429
3. **SAME.** Where the landlord gave an unqualified consent to the assignment of a lease, the assignee is liable for rent only during occupancy, and upon reassigning the lease, there is no consideration for a reservation whereby the landlord consented to the reassignment on condition that the first assignee should remain bound for the rent; and hence all subsequent assignees are liable for rent only during occupancy. *Harvard Investment Co. v. Smith*..... 429

LANDS:

See PUBLIC LANDS.

LAW OF THE CASE:

See APPEAL AND ERROR, 41.

LEADING QUESTIONS:

See WITNESSES, 1.

LEASES:

See LANDLORD AND TENANT.

LETTERS:

Copies of as evidence, see EVIDENCE, 3.

LICENSES:

To owners to plant shade trees in street, see MUNICIPAL CORPORATIONS, 25.

LIENS:

See **MECHANICS' LIENS.**

Mortgage, see **CHATTEL MORTGAGES; MORTGAGES.**

Equitable relief as between claimant of lien and innocent holder of logs, see **EQUITY.**

Loggers' liens, see **LOGS AND LOGGING.**

Tax lien, see **TAXATION.**

LIFE ESTATES:

1. **LIFE ESTATES—FAILURE TO PAY TAXES—WASTE—ACTIONS—PARTIES PLAINTIFF.** An action for the appointment of a receiver of a life estate and to compel the payment of taxes and assessments by the life tenant and prevent waste, cannot be maintained by the administrator with the will annexed, for the benefit of the remainderman without making him a party, neither the administrator nor the remainderman having paid the taxes, since the remainderman is the real and indispensable party in interest. *Hayes v. Gaston*..... 300

LIMITATION:

Of school district indebtedness, see **SCHOOLS AND SCHOOL DISTRICTS.**

LIMITATION OF ACTIONS:

On claims against estate of decedent, see **EXECUTORS AND ADMINISTRATORS, 2.**

Accrual of action for alienation of affections, see **HUSBAND AND WIFE, 5.**

Action by tax title purchaser to quiet title, see **TAXATION, 3.**

Action to set aside tax deed, see **TAXATION, 4.**

1. **LIMITATION OF ACTIONS—CONTRACTS—GUARANTY.** Where a debtor turned over a note in payment of his own debt, at the same time guaranteeing the note, the guaranty is not a promise to pay the debt of another which would be barred when the statute of limitations had run against the note; but it is a promise to pay his own debt, creating a liability during the period of limitations following its written acknowledgment. *Ekre v. Cain*..... 659

LIMITATION OF LIABILITY:

Indemnity deposit by partner as limitation of liability, see **INDEMNITY.**

LOCAL OPTION:

See **INTOXICATING LIQUORS.**

Adoption of as terminating lease of premises used as saloon, see **LANDLORD AND TENANT, 1.**

Subject and title of act, see **STATUTES, 1.**

LOCATION:

Agreed location of boundary line, see **BOUNDARIES**, 2.

LOGS AND LOGGING:

Relief to innocent holder of logs through loss by failure of lien claimant to cash check, see **EQUITY**.

Duty of logging road to guard frogs and switches, see **RAILROADS**, 2.

1. **LOGS AND LOGGING—LABORER'S LIENS—SERVICES OF TEAM—STATUTES.** Under Rem. & Bal. Code, § 1162, the owner of teams has a lien for their services in getting out logs without the rendition of any personal services by him. *Hunt v. Panhandle Lumber Co.*..... 645
2. **LOGS AND LOGGING—LABORER'S LIENS—DEFENSES—PAYMENT.** Loggers' liens cannot be enforced against innocent third parties by laborers who were given checks for the amount of their claims, which, through their negligence and laches, were not presented until after the funds in bank for their payment had been withdrawn by the absconding contractor. *Hunt v. Panhandle Lumber Co.*..... 645

MACHINERY:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 2.

MAILING:

To owner duplicate statements of material furnished, see **MECHANICS' LIENS**, 10-12.

MANDAMUS:

1. **MANDAMUS—TO COURTS—WHEN LIES.** Mandamus lies to compel the trial court to enter judgment upon a verdict of not guilty, after refusal so to do. *State ex rel. Gabe v. Main*..... 381
2. **MANDAMUS—TO COURTS—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL.** Where, notwithstanding a verdict of not guilty, the court refused to enter judgment for the defendant, but forfeited her bond and entered judgment against her and her sureties, the remedy by appeal is not adequate, and mandamus lies to compel vacation of the judgment and entry of proper judgment on the verdict. *State ex rel. Gabe v. Main*..... 381
3. **MANDAMUS—WHEN LIES—TO STATE OFFICERS—SCHOOL BONDS—VALIDITY.** Where bonds issued by a school district in excess of the constitutional limit of indebtedness were purchased by the state officers empowered to invest the school fund, mandamus will not lie to compel the state auditor to issue a warrant for such portion of the bonds as would fall within the constitutional limit, the bonds being void and attacked prior to acceptance of the issue; there being in such case no question of estoppel or good faith. *State ex rel. Zylstra v. Clausen*..... 324

MANDATE:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 42.

MANSLAUGHTER:

See **HOMICIDE**, 1.

MARRIAGE:

See **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Harmless error in instruction in action for injury to servant, see **APPEAL AND ERROR**, 36, 37.

Damages for injury to servant, see **DAMAGES**, 2-4.

Laborer's lien for services, see **LOGS AND LOGGING**.

Liens for labor and materials, see **MECHANICS' LIENS**.

Necessity of servant presenting claim to city for damages, see **MUNICIPAL CORPORATIONS**, 30.

Contract for services, breach, see **WORK AND LABOR**.

1. **MASTER AND SERVANT—SAFE PLACE TO WORK—TAKING DOWN STRUCTURES—DUTY OF MASTER.** In taking down an unsafe wall, the city owes the duty towards its employees to make the place as reasonably safe as the circumstances and character of the work will permit. *Blair v. Spokane*..... 399
2. **MASTER AND SERVANT—GUARDING DANGEROUS MACHINERY—QUESTION FOR JURY.** Upon a conflict of the evidence, it is for the jury to determine whether a combination rip saw could be effectively guarded under the factory act. *Rommen v. Empire Furniture Mfg. Co.*.. 48
3. **MASTER AND SERVANT—NEGLIGENCE—SAFE METHODS.** In an action for the death of a signalman through the fall of a wall, upon which he was directed to stand, the negligence of the city is for the jury, where there was evidence that the wall was unsafe, supports having been negligently removed without putting in proper braces. *Blair v. Spokane* 399
4. **MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE PLANS.** Where a city intended to retain a portion of a defective wall, which it was taking down, and such portion fell and killed an employee, in an action for the death, evidence of negligent construction under defective plans authorized by the city is admissible, the evidence justifying a finding that the collapse of the wall was due to the defective plans in the original construction. *Blair v. Spokane*..... 399
5. **MASTER AND SERVANT—NEGLIGENCE OF MASTER—LACK OF SUPERINTENDENCE.** Where the work of taking down a gin pole was in charge of a foreman, who released a guy rope supporting the pole while men attempted to catch and hold it, the work was such as to require careful superintendence, rendering the master liable for lack thereof,

MASTER AND SERVANT—CONTINUED.

- whether the fall of the pole after it reached a certain angle was due to the laws of gravitation or to a panic of the men who were to support the pole. *Martin v. Hill*..... 433
6. MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL. A sawyer in charge of a saw crew is not a fellow servant of a dogger on the carriage, but a vice principal, as to the nondelegable duties of the master with respect to starting the machinery and giving warning to those in danger of injury therefrom. *King v. Page Lumber Co.* 123
7. MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL—STARTING ENGINE WITHOUT WARNING. A hook tender who left his station and started a logging engine in the absence of the engineer without giving any warning to a sniper working by his direction on a log to which the chain was attached, is a vice principal and not a fellow servant of the sniper, and his act in starting the engine was the act of the master. *Keller v. White River Lumber Co.*..... 153
8. MASTER AND SERVANT—FELLOW SERVANTS—WARNING—SIGNALS. Where plaintiff and a fellow workman were working together at the top story of a building in handling timbers from a hoisting derrick, by means of a cable and pulley, and they did not depend upon the foreman to give warning of a signal to the engineer to hoist, but, on the contrary, the foreman depended upon them to give the signal, the two are fellow servants, and plaintiff cannot recover, where his fellow workmen on being asked if they were ready for the hoist, replied "all ready; go ahead," whereupon the foreman signaled the engineer to start the hoist without warning the plaintiff, thereby causing his hand to be drawn into the pulley; and it is immaterial that plaintiff had the lesser experience of the two and usually relied upon his fellow worker to give the signal. *Frenge v. Stone & Webster Engineering Corporation*..... 204
9. SAME—FELLOW SERVANTS—ACT OF SUPERINTENDENCE. Where the work of taking down a gin pole required consociation and concert of action and could not proceed safely without supervision, the master is liable for the want of proper supervision, and one selected by him to control the matter is not a fellow servant of the men assisting in the work. *Martin v. Hill*..... 433
10. MASTER AND SERVANT—NEGLIGENCE—METHODS OF BUSINESS—SIGNALS—FELLOW SERVANTS. The failure of a signalman to transmit a signal to start a donkey engine in a logging camp does not relieve the master from liability for injuries to a rigging slinger, as being an act of a fellow servant, where the accident was not the fault of the signalman, but was due to a faulty system in stationing the signalman too near the engine. *Toupin v. Kent Lumber Co.*..... 594

MASTER AND SERVANT—CONTINUED.

11. MASTER AND SERVANT—SAFE APPLIANCES—SIMPLE INSTRUMENTS—ASSUMPTION OF RISKS. The evidence is insufficient to sustain a recovery in an action by a stoker for injuries sustained in the fall of a pan he was carrying by reason of alleged defects in the handle through the loss of rivets, where there was no evidence that such condition impaired its safety, the plaintiff's evidence showed that the handles slipped from his hand, and that from constant use, he had equal means of knowledge as to any defects in the handle; since it was an implement of simple construction which does not come within the rule of safe instrumentalities. *Cole v. Spokane Gas and Fuel Co.*..... 393
12. SAME—ASSUMPTION OF RISKS—OBVIOUS DANGERS—DEFECTIVE METHODS. A signalman directed to stand upon a wall does not assume the risks of negligence of the city in failing to adopt a reasonably safe method of doing the work, but only such as are obvious after the city has discharged its duty; and where the city engineer in charge of the work did not anticipate that the wall would fall, it cannot be said that the danger was obvious. *Blair v. Spokane.* 399
13. MASTER AND SERVANT—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—COMPLIANCE WITH COMMAND. Where a servant was told not to use a ladder until it was made secure, and it was nalled, and later moved by the foreman and replaced without making it secure, the servant does not assume the risk and is not guilty of contributory negligence, as a matter of law, in obeying an order to go down the ladder, as he had the right to assume that it had been made secure. *Campbell v. Winslow Lumber Co.*..... 507
14. SAME—CONTRIBUTORY NEGLIGENCE—DANGEROUS PLACE—PROXIMATE CAUSE. Where an employee was injured while attempting to board an engine, the engine starting up without warning while his foot was caught in a frog, contributory negligence in seeking to ride upon the cowcatcher, or in walking on the track until he reached the engine, will not preclude a recovery, since the proximate cause was the starting of the engine without warning, and the injury was not caused by dangers incident to riding on the cowcatcher or walking on the track. *Alberg v. Campbell Lumber Co.*..... 84
15. SAME—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER. A signalman, injured by the fall of a wall upon which he was directed to stand in giving signals, is not guilty of contributory negligence from mere knowledge of the danger, it being for the jury to determine whether he used care commensurate therewith. *Blair v. Spokane* 399
16. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS. Where a signalman takes a position on a wall in obedience to the order of a foreman, it cannot be said that he was so reckless as to bar a recovery. *Blair v. Spokane.*..... 399

MASTER AND SERVANT—CONTINUED.

17. SAME—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCY—WARNING. A servant is not precluded from recovering from the fact that he did not save himself in an emergency on a warning to "look out," where he attempted to do so, although others more favorably situated got out of danger. *Martin v. Hill*..... 433
18. MASTER AND SERVANT—INJURY TO SERVANT—OPERATION OF SAW—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. The operator of a rip saw is not guilty of contributory negligence, as a matter of law, in attempting to remove a board after a pinch has stopped the saw, without first turning off the power at a switch eight feet away, or without calling some one to his assistance, where it appears that there was great danger in leaving the board in the saw to reach the switch, and where he firmly held the board and it would not be anticipated that the board firmly held would rebound upon the friction being removed in the manner that it did. *Rommen v. Empire Furniture Mfg. Co.*..... 48
19. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—EVIDENCE—SUFFICIENCY. A carpenter does not assume the risks and is not guilty of contributory negligence, as a matter of law, in responding to a request to lend a hand in taking down a gin pole, so as to preclude a recovery when the pole fell through lack of superintendence, on the release of a guy rope, either by the laws of gravitation or by the panic of the men, especially where other skilled men accepted equal risks. *Martin v. Hill*..... 433
20. MASTER AND SERVANT—INJURIES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. An employee in a logging camp, whose foot caught in an unblocked frog while attempting to board an engine, is not guilty of contributory negligence, as a matter of law, the same being a question for the jury, where it appears from his testimony that he was called upon to board the engine, upon which were many men, and that he was looking for a place to get on and failed to see the frog, that the place he sought was not dangerous and was a good place to stand, and the evidence shows that the engine started up without any warning. *Alberg v. Campbell Lumber Co.*..... 84
21. MASTER AND SERVANT—NEGLIGENCE—FAILURE TO INSTRUCT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The master's negligence and the contributory negligence of the plaintiff are for the jury, where plaintiff was set to work as a dogger on a saw carriage without any previous experience or instructions, and was injured through erroneously setting a dog and attempting to reset it as the sawyer suddenly started the log through the saw when plaintiff was near the saw. *King v. Page Lumber Co.*..... 123
22. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a rigging slinger in a logging camp was guilty of contributory negligence in not getting out of

MASTER AND SERVANT—CONTINUED.

danger, or in giving the wrong signal, is for the jury, where it appears that, after attaching the cable to a log to be hauled in, it is not practicable or customary for the slinger to get out of the zone of danger before giving the signal to start the engine; that, upon plaintiff's giving the signal, the front of the log, which was obscured by brush, failed to start, and the rear end began to rise, when he immediately gave the signal to stop, which was not obeyed and he was struck by the log, and it appears that the failure to stop was due to error of the foreman in stationing the signalman too near the engine; and it also appeared that he gave the signal to "start" which seemed to him to be proper, and it is doubtful whether he should have given a signal to "start slowly." *Toupin v. Kent Lumber Co.* 594

23. **MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDERS—EVIDENCE—QUESTION FOR JURY.** In an action for personal injuries sustained by a loader of logs through the fall of a log from the load, the negligence of the master and contributory negligence are for the jury, where it appears that plaintiff loaded a car to its capacity, but the foreman ordered another log put on, to which the plaintiff at first objected because it would not stay on, but finally deferred to the foreman's judgment, putting on another log in the presence of the foreman, which afterwards fell off and struck the plaintiff while he was setting a brake in the discharge of his duties. *Knudsen v. Moe Brothers*..... 118

24. **MASTER AND SERVANT—NEGLIGENCE—PRESUMPTION.** The doctrine of *res ipsa loquitur* does not go to the extent of raising a presumption of negligence from the mere fact of an injury, but only that certain facts, when established, speak negligence. *Cole v. Spokane Gas and Fuel Co.*..... 393

25. **SAME—WARNING—QUESTION FOR JURY.** Whether a servant was warned of the danger of the fall of a wall upon which he was directed to stand, is for the jury, where there was a conflict in the evidence as to two of the warnings, and the third warning was as to a danger that did not contribute in any way to the accident. *Blair v. Spokane*..... 399

26. **MASTER AND SERVANT—NEGLIGENCE—OPERATION OF TRAINS—INSTRUCTIONS.** While a trainman operating a defective car at excessive speed so that it jumped the track cannot recover if the jumping of the track was the result of such unsafe condition combined with the dangerous rate of speed, yet an instruction that, if the jumping of the track was the result of a dangerous rate of speed, the plaintiff could not recover, would naturally be understood by the jury as having reference to the particular car, and it would be unnecessary to draw a distinction between the rate of speed for a car in good condition and one that was in an unsafe condition. *Oheichi v. Northern Pac. R. Co.*..... 36

MASTER AND SERVANT—CONTINUED.

27. MASTER AND SERVANT—INJURY TO THIRD PERSONS—SCOPE OF EMPLOYMENT—QUESTION FOR JURY. In an action for the death of a person run down by a taxicab, the fact that the taxicab belonged to the defendant and that the driver was in its employ as one of its regular drivers is sufficient to raise a question for the jury as to whether the driver was acting in the scope of his employment. *Burger v. Taxicab Motor Co.*..... 676
28. SAME—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. In such a case, the *prima facie* case that the driver was acting in the line of his employment is not overcome by evidence that he was on the way to his night lunch and that it was contrary to rules of the defendant to take their cars on the way to meals, especially in view of impeaching evidence that it was not contrary to rules and was customary to do so. *Burger v. Taxicab Motor Co.*..... 676
29. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—EXISTENCE OF RELATION—AGENCY—INDEPENDENT CONTRACTORS—EVIDENCE—SUFFICIENCY. A *prima facie* case of agency is shown, and the burden of proof is upon defendant to show that the work was done by an independent contractor, where it appears that plaintiff's property was injured by blasting prosecuted in aid of defendant's enterprise by another telephone company, as claimed by a witness who knew nothing of the contract, that the two companies had a common president, and that he was directing the work, and the alleged contracting company was doing no work other than construction work for the defendant company. *Norwegian Danish Methodist Episcopal Church v. Home Telephone Co.*..... 511
30. SAME. Where blasting in a city street is done by virtue of defendant's franchise, an independent contractor doing the work may also be the agent of the defendant, rendering defendant liable for the negligence of the contractor on the principle of *respondet superior*. *Norwegian Danish Methodist Episcopal Church v. Home Telephone Co.* 511

MATERIALITY:

Of evidence in criminal prosecutions, see CRIMINAL LAW, 4; PROSTITUTION, 2.

MATERIALS:

Duplicate statement to owner of materials furnished to contractor, see MECHANICS' LIENS.

MEASURE OF DAMAGES:

See DAMAGES.

For breach of contract to regrade lots, see CONTRACTS, 4.

On breach of contract for services, see WORK AND LABOR.

MECHANICS' LIENS:

1. **MECHANICS' LIENS — CLAIM — DUPLICATE STATEMENT — MATERIALMEN—CONTRACTORS.** Rem. & Bal. Code, § 1133, providing that no lien for materials shall be enforced unless duplicate statements shall be sent to the owner of all materials furnished to any person or contractor, applies only to materialmen and has no application to a lien claimed by a contractor furnishing both labor and materials for decorative plaster work under a contract with the owner through the owner's agent. *Architectural Decorating Co. v. Nicklason*.. 198
2. **SAME—DUPLICATE STATEMENTS—MATERIALS FURNISHED TO OWNER.** Rem. & Bal. Code, § 1133, requiring materialmen to furnish to the owner duplicate statements of all materials furnished to any person or contractor, has no application to materials furnished direct to the owner under a contract made by the owner's agent. *Architectural Decorating Co. v. Nicklason*..... 198
3. **MECHANICS' LIENS—CLAIMS—NOTICE—DUPLICATE STATEMENTS — MATERIALS.** Subcontractors furnishing the materials and doing the work of putting down hard wood floors in a building and installing a plumbing and heating plant must deliver duplicate statements of the materials furnished at the time the same are delivered, in order to obtain a lien for the material, under Rem. & Bal. Code, § 1133, providing that "every person" furnishing material to be used in the construction of a building deliver duplicate statements thereof to the owner. *Heim v. Elliott*..... 361
4. **SAME—DUPLICATE STATEMENTS—LABOR.** Subcontractors furnishing material and doing work in the putting down of hard wood floors and installing plumbing and heating plants in a building are entitled to a lien for the value of the labor under Rem. & Bal. Code, § 1129, although they lost their lien for materials through failure to deliver duplicate statements to the owner of the material used, as required of materialmen by § 1133, and although the material and labor were furnished under an indivisible contract with the general contractor. *Heim v. Elliott*..... 361
5. **SAME — MATERIALS TO BE FURNISHED — DUPLICATE STATEMENTS.** Rem. & Bal. Code, § 1133, requiring a materialman to deliver to the owner duplicate statements of material furnished at the time the same is delivered, is not substantially complied with by delivering with the first load one duplicate statement of all material to be furnished, where the deliveries were continued from day to day and extended over a period of several months. *Heim v. Elliott*..... 361
6. **MECHANICS' LIENS — MATERIALS FURNISHED — ITEMS LIENABLE — DUPLICATE STATEMENTS—PARTIAL PAYMENTS—APPLICATION.** Where the first part of lumber furnished to the general contractor for a building was not lienable because the lumber company failed to deliver duplicate statements to the owner during all the time the lum-

MECHANICS' LIENS—CONTINUED.

ber was delivered, partial payments made to the lumber company without any direction as to their application may be applied by the company to the oldest items of the account, and a lien established for the balance of the last items furnished for which duplicate statements were delivered; and the owner cannot defeat such application by asserting that a bonding company not a party to the suit had an equity to have the payments otherwise applied. *Heim v. Elliott* 361

7. MECHANICS' LIENS—NOTICE TO OWNER—DUPLICATE STATEMENTS—SUBSEQUENT MORTGAGES—PRIORITY. Under Rem. & Bal. Code, § 1133, requiring duplicate statements to be furnished to the owner at the time material is delivered, notice must be given to the one who was known to hold the legal title to the lots, of lumber delivered to one in possession under a lease with an option to buy, notwithstanding that subsequently the owner gave a deed to the lessee and took back a mortgage, and that Rem. & Bal. Code, § 1132, makes a mechanics' lien superior to mortgages subsequent to the commencement of the furnishing of the materials. *Hewitt Lea Lumber Co. v. Sandell* 515
8. MECHANICS' LIENS—MATERIALMEN—NOTICE TO OWNER—DUPLICATE STATEMENTS. A delivery to the contractor of duplicate statements of lumber furnished to the contractor for the construction of a house, is not a compliance with Rem. & Bal. Code, § 1133, providing for the delivery of duplicate statements to the owner; even though the court makes a general finding that the contractor was the agent of the owner in ordering the material, and in sole charge of the building; unless the evidence clearly established an agency for that purpose. *Seattle Lumber Co. v. Richardson & Elmer Co.*..... 671
9. MECHANICS' LIENS—NOTICE TO OWNER—DUPLICATE STATEMENTS—TIME FOR DELIVERY. Under Rem. & Bal. Code, § 1133, requiring that duplicate statements of materials furnished must be delivered to the owner "at the time" materials are furnished, a statement August 18, of materials furnished on various days from July 30 to August 12, is insufficient to support a lien. *Seattle Lumber Co. v. Richardson & Elmer Co.* 671
10. SAME—FAILURE TO GIVE NOTICE—ABSENCE OF OWNER—MAILING—ADDRESS. The absence of the owner from the city does not excuse a lien claimant from delivering duplicate statements of materials at the time the same are furnished, since the statute provides for service by mail; especially where the owner's resident address, where his wife was living, was given in the city directory and no attempt was made to ascertain the address or residence. *Seattle Lumber Co. v. Richardson & Elmer Co.*..... 671
11. SAME—MAILING NOTICE—ADDRESS. Mailing of duplicate statements to the owner addressed to him at the place where the building was being constructed is not a compliance with the statute requiring

MECHANICS' LIENS—CONTINUED.

the notices to be personally served or mailed to his last known place of residence, where that had never been his residence, as an inspection would have disclosed, and his residence was given in the city directory. *Seattle Lumber Co. v. Richardson & Elmer Co.* 671

12. **SAME—FAILURE TO GIVE NOTICE—EXCUSES.** The fact that contractors misled materialmen as to the correct address of the owner, a resident of a large city, does not excuse their failure to properly serve or mail duplicate statements to the owner at the time material is furnished. *Seattle Lumber Co. v. Richardson & Elmer Co.* 671

METHOD OF WORK:

See **MASTER AND SERVANT**, 3-5, 9, 10, 12.

MINORS:

See **INFANTS**.

Waiver of objection to minority of plaintiff, see **PARTIES**.

MISCONDUCT:

Of judge as harmless error, see **APPEAL AND ERROR**, 28.

MISREPRESENTATION:

See **FRAUD**.

As ground for rescission of contract, see **VENDOR AND PURCHASER**, 4, 5.

MISTAKE:

As ground for vacating divorce decree, see **DIVORCE**, 4.

As effecting release by way of estoppel, see **ESTOPPEL**, 1.

In sale of state lands, see **PUBLIC LANDS**, 7, 8.

MODIFICATION:

Of decree in divorce, see **DIVORCE**, 6.

MORTGAGES:

Provisions of mortgage securing note as affecting negotiability, see **BILLS AND NOTES**, 2.

Personal property, see **CHATTEL MORTGAGES**.

Priority of, see **MECHANICS' LIENS**, 6.

Recording assignment of, see **RECORDS**, 1.

Subject and title of recording act, see **STATUTES**, 2.

Power of trustee to deed property to mortgagee upon failure to effect sale or obtain balance of purchase price from subscribers, see **TRUSTS**, 1.

1. **MORTGAGES — INDEMNITY MORTGAGE — CONSIDERATION.** Where a surety company guaranteeing a building contract had already advanced money or subsequently advanced it, a deed of property given

MORTGAGES—CONTINUED.

as indemnity is supported by a sufficient consideration, although it was volunteered. *Empire State Surety Co. v. Ballou*..... 76

2. **MORTGAGES—FORECLOSURE—VENUE—JURISDICTION.** Under Rem. & Bal. Code, § 1016, providing that a mortgagee may foreclose in the superior court of the county where the land or some part of it lies, two trust deeds of lands in two counties may be foreclosed by an action in either county. *Empire State Surety Co. v. Ballou* 76

MOTIONS:

Dismissal or nonsuit on trial, see **TRIAL**, 4, 5.

MUNICIPAL CORPORATIONS:

Bribery of police officer, see **BRIBERY**.

Damages on breach of contract for regrade of city lots, see **CONTRACTS**, 3, 4.

Condemnation for public improvement, see **EMINENT DOMAIN**, 5, 9.

Right of city to build bridge over navigable water, see **NAVIGABLE WATERS**.

Street railroads, see **STREET RAILROADS**.

1. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—BONDS OF CONTRACTORS—LIABILITY OF SURETY—STATUTES—CONSTRUCTION.** A contractor on public work and his surety on a bond, given pursuant to Rem. & Bal. Code, § 1161, to indemnify laborers and materialmen, are not liable for wages due to a laborer under an agreement with a subcontractor in excess of the reasonable value of the services. *Kongsbach v. Casey*..... 643
2. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES—LIABILITY OF CONTRACTOR.** Where, under the authority of condemnation proceedings, a city made a regrade of a street and a slope of forty-five degrees on abutting lots, but the nature of the soil was such that the slope was not sufficient for lateral support, and the balance of the lots were damaged by slides, the city, and not the contractor doing the work, is liable for the damage, where the slides would have occurred whether the work had been carefully done or not. *Casassa v. Seattle*..... 146
3. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES TO PROPERTY—ORIGINAL GRADES—SURFACE WATERS—DIVERSION.** A city not being liable to property owners for damages from the original grading of streets, under Rem. & Bal. Code, § 7815, and surface water being an outlaw and common enemy against which any one may defend himself, a city is not liable for damages from the impounding upon lots of surface waters through the construction of fills in streets and alleys in making initial grades. *Wood v. Tacoma*..... 266
4. **SAME.** Surface waters discharged through a manhole in a sewer upon lots in a diffused form as it would have flowed in any event do not render the city liable for damages. *Wood v. Tacoma*..... 266

MUNICIPAL CORPORATIONS—CONTINUED.

5. MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGE TO PROPERTY—
NEGLIGENCE—LIABILITY—SURFACE WATERS. A city is not liable for
temporary damages occasioned by negligence in making initial
grades in streets and alleys, whereby surface water was impounded
upon plaintiff's lots, where the plaintiff had reasonable notice of the
city's intention to make the fills impounding the water and oppor-
tunity to defend her property by draining off the water or filling
the property. *Wood v. Tacoma*..... 266

6. MUNICIPAL CORPORATIONS—ASSESSMENTS—JURISDICTION—LANDS
BEYOND CITY LIMITS. An assessment levied by a city for the con-
struction of a dike, under Rem. & Bal. Code, §§ 7955-7964, upon
property outside of the city is void, the city having no extraterri-
torial jurisdiction, in the absence of express statutory authority.
Edmonds Land Co. v. Edmonds..... 201

7. SAME—ESTOPPEL—JURISDICTION. A city cannot acquire jurisdic-
tion to levy an assessment on lands outside its limits by estoppel
through the fact that the owner of the lands petitioned for the im-
provement, as the petition would not justify any proceeding in
excess of the city's jurisdiction, especially where objection was duly
made to the unwarranted action at the first opportunity. *Edmonds
Land Co. v. Edmonds*..... 201

8. SAME—ASSESSMENTS—PROPERTY SUBJECT—EASEMENTS—RAILROAD
FRANCHISE. Where a railroad company has a mere easement or
right of way to maintain tracks in a street, it cannot be assessed for
benefits from the improvement of the street, required to be assessed
against abutting property benefited thereby; especially where its
franchise compelled it to make a substantial cash contribution to-
wards the expense of the improvement. *In re Westlake Avenue* 277

9. SAME—ASSESSMENT—STREET RAILWAY FRANCHISE. The franchise
of a street railway is not assessable for benefits from a public im-
provement from the fact that the company was benefited thereby.
Spokane v. Curtiss..... 555

10. SAME—PROPERTY LIABLE—SPECIAL BENEFITS—POWER OF COURT.
Under Rem. & Bal. Code, §§ 7790, 7795, 7796, property can only be
assessed if specially benefited, and it is not proper to include in an
assessment district property that receives merely a general benefit.
In re Fifth Avenue etc...... 327

11. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—BENE-
FITS. A city cannot be generally assessed for a public improvement
unless it is specially benefited, nor merely because it was negligent
in improving a street for the benefit of a street railway company
without exacting an agreement from the company to contribute to
the expense. *Spokane v. Curtiss*..... 555

MUNICIPAL CORPORATIONS—CONTINUED.

12. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT DISTRICTS —FIXING BOUNDARIES — APPORTIONMENT OF EXPENSE — REVIEW BY COURTS.** The courts will not review the action of eminent domain commissioners in fixing the boundaries of improvement districts or in apportioning all the expenses to the property without charging the general fund of the city, where there is no showing of arbitrary action, fraud, or mistake. *In re Twelfth Avenue*..... 97
13. **SAME—POWER TO ASSESS CITY.** Under an ordinance for the improvement of a street the cost and expense to be paid "wholly by special assessment upon the property to be benefited," the eminent domain commissioners have no power to assess the city generally for a portion of the expense, in view of Rem. & Bal. Code, § 7785, conferring upon the city council the power to determine whether the cost should be made wholly by special assessment upon property benefited, or partly from the general fund of the city, and § 7790, authorizing the city council to fix an assessment district which "shall be conclusive and binding" on the commissioners. *Spokane v. Curtis* 555
14. **SAME—APPORTIONMENT OF PUBLIC AND PRIVATE BENEFITS—POWERS OF COUNCIL AND COMMISSIONERS—APPEAL—REVIEW.** Under Rem. & Bal. Code, §§ 7786, 7787, authorizing the city council to determine whether an improvement shall be made wholly or partly at the expense of abutting property, and § 7790, authorizing commissioners to apportion benefits between the city and abutting owners by a comparison of the public and private benefits to be derived from the improvement, it is within the power of the council to make the apportionment, and for the commissioners to act only when the council fails to do so; and in any event, the benefit to the public must be a special and not a general benefit, and findings of the court or commissioners are conclusive on appeal. *In re Fifth Avenue etc.*... 327
15. **SAME—AMOUNT OF ASSESSMENTS—ACCRUING INTEREST.** An assessment for a local improvement may include accumulated interest pending the making of the assessment roll, where the authorities proceeded with diligence in preparing the roll. *In re Twelfth Avenue* 97
16. **MUNICIPAL CORPORATIONS — ASSESSMENTS — BENEFITS — AWARD OF COMPENSATION AS BAR TO SUBSEQUENT ASSESSMENT.** Laws 1907, p. 321, § 15, providing that for improvements to be paid by special assessment upon property benefited, the compensation found by the jury shall be irrespective of any benefit from the improvement, does not require a city, on condemning land for opening a street, to include the improvement of the street or the establishment of a grade; hence the award of damages for compensation for merely opening a street does not bar an assessment for benefits in a subsequent proceeding to grade and plank the street. *Martenis v. Tacoma*.... 92

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17. **SAME—PROCEEDINGS—ISSUES.** Under a proceeding to condemn land for the opening of a street pursuant to an ordinance which did not provide for an established grade or any improvement of the street, an award of damages precluding any assessment for benefits on account of the condemnation, does not bar an assessment for benefits in a subsequent proceeding to establish a grade and improve and plank the street; notwithstanding that the city attorney in the first proceeding went beyond the issues in propounding questions to the jury, who were instructed to award damages that will be sustained by the "construction of the proposed road," there having been no evidence thereon or on the question of damages by reason of any improvement of the roadway. *Martenis v. Tacoma*..... 92
18. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—BENEFITS—CONTEMPLATED IMPROVEMENTS—BRIDGES.** Upon the improvement of a street crossing a navigable waterway in contemplation of the erection of a bridge, raising the grade to make proper approaches for the bridge which would be useless for any other purpose, property abutting on the streets may be assessed for the benefits that will accrue by subsequently constructing the bridge, although not yet provided for, where the bridge is an essential part of the improvement and will materially benefit the property, and the evidence shows that the bridge will be erected at that place. *In re Westlake Avenue*..... 277
19. **SAME—ASSESSMENT ROLL—SPECIAL BENEFITS—EVIDENCE—PRESUMPTIONS.** An assessment roll returned by commissioners is admissible as evidence of the benefits received, and that property outside the district was not specially benefited, and overcomes the *prima facie* showing made by a reassessment arbitrarily ordered by the court. *In re Fifth Avenue etc.*..... 327
20. **SAME—EVIDENCE—SUFFICIENCY.** The unanimous opinion of commissioners that property should be excluded from an assessment district because not specially benefited, is conclusive on the courts, where it appears that the improvement was to gain easier grades and divert travel from the property in question, which was on higher ground and beyond the influence of the special benefits contemplated. *In re Fifth Avenue etc.*..... 327
21. **SAME—ASSESSMENTS—BENEFITS.** Street improvements benefiting a street railway by enabling it to lay double tracks and reduce its curves are a benefit to the property in the district accessible thereto, although a part of the property in the district fronts upon another street car line; such fact going to the amount and not to the fact of the benefits. *Spokane v. Curtiss*..... 555
22. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—CONFIRMATION—OBJECTIONS—TIME FOR MAKING.** Under Rem. & Bal. Code, § 7532, providing that the regularity, validity and correctness

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- of a local assessment must be challenged when the roll is before the city council for confirmation and all objections not so made are conclusively waived, and § 7533, providing that the assessment becomes conclusive in all things upon all parties not appealing therefrom, an objection to an assessment in that it exceeds fifty per cent of the assessed valuation of the property, in violation of the city charter, is waived if the objection is not made before the city council and appeal taken. *Rucker Brothers v. Everett*..... 366
23. SAME—ASSESSMENTS—REVIEW—CONFIRMATION. Upon confirmation of an assessment roll for a public improvement in a special district, the court must keep within the issues raised by the objections, and cannot direct a change in the district unless it is challenged by a property owner therein. *Spokane v. Curtiss*..... 555
24. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REVIEW. An assessment of special benefits, while a subject for judicial inquiry, will not be set aside on appeal as excessive, unless the evidence so preponderates as to indicate arbitrary action. *In re Fifth Avenue etc.* 327
25. MUNICIPAL CORPORATIONS—STREETS—ABUTTING OWNERS—SHADE TREES. In improving a street, the city may revoke a license theretofore granted to abutting owners to plant shade trees in the street, and may destroy trees planted without liability therefor, where the action is not wanton or unreasonable. *Robinson v. Spokane*.... 527
26. MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The negligence of the driver of a taxicab that struck and killed plaintiff's decedent, is for the jury, where there was evidence that he was driving at a speed of 25 miles an hour and exceeding the speed limit, that no horn or alarm was sounded, that he might have seen the deceased when more than 100 feet distant, but he testified that he did not see him until within twenty-five feet, and that he applied both brakes, stopping the car within twenty-five feet. *Burger v. Taxicab Motor Co.* 676
27. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Whether a member of a city sewer gang, cleaning out catch basins at night, who was struck and killed by a taxicab, was guilty of contributory negligence, is for the jury, where it appears that he was at work where his duty placed him, which required him to walk slowly in a stooping position and give attention to the work in hand. *Burger v. Taxicab Motor Co.*..... 676
28. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—INSTRUCTIONS. In an action for negligent driving of an automobile in a city street, error in refusing to withdraw an issue as to whether an alarm was sounded within 30 feet of a crossing, it appearing that the street was closed, is not prejudicial, where the court instructed

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the jury that the evidence of failing to sound a warning could not be considered if they found that the street was not opened and traveled. *Burger v. Taxicab Motor Co.*..... 676

29. **MUNICIPAL CORPORATIONS — CLAIMS — PRESENTATION — CHARTER — STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 7995, providing that claims for damages in tort against cities of the first class filed "in compliance with valid charter provisions," shall state the actual residence of the claimant, by street and number, has no application to claims as to which the city charter did not require any notice or demand. *Wolpers v. Spokane.*..... 633

30. **SAME—CLAIMS BY SERVANT OF CITY—SAFE PLACE TO WORK.** The charter of the city of Spokane providing that all claims for damages for personal injuries alleged to have been sustained by reason of the negligence of the city or any officer, agent, or servant thereof, be presented to the city council, has no application to claims arising out of the relation of master and servant and the failure of the city to furnish a servant with a safe place to work. *Wolpers v. Spokane* 633

MURDER:

See HOMICIDE.

NAMES:

Filing designation of firm, see PARTNERSHIP, 1, 2.

NAVIGABLE WATERS:

1. **NAVIGABLE WATERS—BRIDGES—RIGHT TO ERECT—FEDERAL CONSENT —POLICY.** The secretary of war having consented to the erection of a temporary bridge across the Lake Washington canal, the same to be "removed or rebuilt when the work of constructing the canal may render such action necessary," the city has power to build a permanent bridge at that point upon complying with required conditions, under 30 Stats. at L. 1151, providing that structures may be built under authority of the legislature of the state across waterways wholly within the limits of the state when the location and plans therefor have been approved by the chief of engineers and secretary of war, and Rem. & Bal. Code, §§ 7868, 7869, in harmony therewith, in view of the settled policy of the Federal government to allow local authorities to select the location for such bridges, subject to the approval which was given; it not being contemplated that the Federal government might subsequently arbitrarily refuse to approve the location of a proper bridge at that place. *In re Westlake Avenue* 277

NAVIGATION:

See NAVIGABLE WATERS.

NECESSITY:

Presence of accused at trial, see **CRIMINAL LAW**, 10-12.

For election between offenses, see **CRIMINAL LAW**, 13.

Of commitment as authority for custody and detention of prisoner, see **ESCAPE**, 2.

NEGLIGENCE:

Of surveyor in establishing lines of lot, see **BOUNDARIES**, 3-5.

Measure of damages, see **DAMAGES**, 2-4.

Sale of explosive, see **EXPLOSIVES**.

In presenting checks given in payment of services, see **LOGS AND LOGGING**, 2.

Of master causing injury to servant, see **MASTER AND SERVANT**.

Contributory negligence of servant as question for jury, see **MASTER AND SERVANT**, 13-23.

Of city in making grade of street and impounding surface waters on lots, see **MUNICIPAL CORPORATIONS**, 5.

Of person injured on street, see **MUNICIPAL CORPORATIONS**, 27.

Of driver of taxicab in running down pedestrian, see **MUNICIPAL CORPORATIONS**, 26-28.

Failure to guard frogs and switches, see **RAILROADS**, 3.

In operation of street car, see **STREET RAILROADS**.

1. **NEGLIGENCE—DANGEROUS PREMISES—STEPS—EXIT OF THEATER.** The mere fact that one step down is maintained at a side exit of a moving picture theater is not evidence of negligence, where the way was properly lighted. *Hollenbaek v. Clemmer*..... 565
2. **NEGLIGENCE—DANGEROUS PREMISES—ISSUES AND PROOF—FAILURE OF PROOF.** In an action for personal injuries sustained through the fall of a swing, predicated upon the allegations that the defendant owned and controlled the park where the injury happened and maintained the swing, there can be no recovery where all the evidence showed the swing to be outside the park and not within defendant's control; and a verdict for plaintiff cannot be sustained on the theory that, there being no dividing line, the public might regard the place as within the park. *Schwab v. Anderson Steamboat Co.*..... 236

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES**.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see **NEW TRIAL**, 5, 6.

NEW TRIAL:

Review of orders relating to, see **APPEAL AND ERROR**, 13, 17-19.

Remand of case for on reversal of nonsuit, see **APPEAL AND ERROR**, 42.

1. **NEW TRIAL—MISCONDUCT OF ATTORNEY—DISCRETION—ABUSE—APPEAL—REVIEW.** It is not an abuse of discretion to grant a new trial

NEW TRIAL—CONTINUED.

- for misconduct of counsel who misstated the ruling of the supreme court upon similar facts, placed before the jury the finding of the court in such case upon similar facts, improperly discussed the legal effect of answers to certain findings upon special interrogatories and their legal effect upon the general verdict, where the court had a well-founded doubt, from the cumulative effect of these and other indiscretions, whether a fair trial had been had. *Snider v. Washington Water Power Co.*..... 598
2. **SAME.** It is not an abuse of discretion to grant a new trial for misconduct of counsel, where instructions to disregard various acts and misconduct complained of did not adequately cover some of the instances, and left one of them wholly unwarranted. *Snider v. Washington Water Power Co.*..... 598
3. **NEW TRIAL—MISCONDUCT OF JURY—IMPEACHING VERDICT.** A quotient verdict will not be set aside as arrived at by lot or chance, where it was not shown that there was an agreement to abide by the result, and there was no attempt to make the impeachment of the verdict complete. *Wiles v. Northern Pac. R. Co.*..... 337
4. **NEW TRIAL—MISCONDUCT OF JURY—EVIDENCE—REVIEW.** The denial of a new trial for misconduct of a juror is warranted, although four witnesses testified that the juror stated that he would hang the defendant if called as a juror, where the juror and one witness contradicted their testimony, the juror claiming that the conversation related to another crime. *State v. Moretti*..... 537
5. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.** A motion for a new trial on the ground of newly discovered evidence of a witness in a distant state, who was telegraphed to a day or two after the trial, is properly denied for want of a showing of diligence, where the circumstances showing diligence were not stated and it was not shown how or from whom the information was obtained. *State v. O'Brien*..... 219
6. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.** A new trial for newly discovered evidence is properly denied, where it was based upon hearsay as to what two witnesses would testify to, and their affidavits were not produced, and no diligence in securing the evidence was shown. *Wiles v. Northern Pac. R. Co.*..... 337

NONSUIT:

On trial, see TRIAL, 4, 5.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

- Of defect in note, see **BILLS AND NOTES**, 6.
- Record of mortgage as notice, see **CHATTEL MORTGAGES**, 1.
- Of oral injunctonal order, see **CONTEMPT**, 1.
- Execution sale, see **EXECUTION**, 1.
- Of appraisal and setting aside of homestead to widow, see **EXECUTORS AND ADMINISTRATORS**, 1.
- Of rejection of claim against estate, see **EXECUTORS AND ADMINISTRATORS**, 3.
- To owner of materials furnished contractor, see **MECHANICS' LIENS**.
- Claim for injuries, see **MUNICIPAL CORPORATIONS**, 29, 30.

OBJECTIONS:

- Waiver on appeal, see **CRIMINAL LAW**, 25.
- To assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 22, 23.
- Waiver of as to minority of plaintiff, see **PARTIES**.
- Waiver of to maintenance of action by firm, see **PARTNERSHIP**, 2.
- Waiver of objections to ruling on pleading, see **PLEADING**, 2.

OFFERS:

- Evidence of to show value of land, see **EMINENT DOMAIN**, 1, 2.

OFFICERS:

- Bribery, see **BRIBERY**.
- Corporate officers, see **CORPORATIONS**, 2-5.
- Mandamus affecting, see **MANDAMUS**, 3.
- Liability of sheriff for false return, see **SHERIFFS AND CONSTABLES**.

OPENING:

- Judgment, see **JUDGMENT**, 1, 2.

OPINION EVIDENCE:

- In criminal prosecution, see **CRIMINAL LAW**, 7.
- In civil actions, see **EVIDENCE**, 6.

OPTION:

- Local option, see **INTOXICATING LIQUORS**.

ORAL CONTRACTS:

- See **FRAUDS, STATUTE OF**.

ORDERS:

- Review, see **APPEAL AND ERROR**, 8-10, 12, 13, 17-19; **CERTIORARI**.
- Disobedience of as contempt, see **CONTEMPT**.
- Conclusiveness of order setting aside homestead to widow, see **JUDGMENT**, 5.

PACKAGES:

Delivery of liquor in unbroken package, see **INTOXICATING LIQUORS**, 2.

PARENT AND CHILD:

Custody of children on divorce, see **DIVORCE**, 6.

PAROL CONTRACTS:

See **FRAUDS, STATUTE OF**.

PAROL EVIDENCE:

In civil actions, see **EVIDENCE**, 4, 5.

To explain trust agreement, see **TRUSTS**, 5.

PARTIES:

Construction of contract by, see **CONTRACTS**, 1.

Entitled to damages in condemnation proceedings, see **EMINENT DOMAIN**, 7, 8.

In action to vacate judgment, see **JUDGMENT**, 2.

Concluded by judgment, see **JUDGMENT**, 3.

To action by administrator for appointment of receiver for life estate, see **LIFE ESTATES**.

Persons entitled to mechanic's lien, see **MECHANICS' LIENS**.

Entitled to recover for injuries from failure to guard frogs and switches, see **RAILROADS**, 3.

1. **PARTIES—CAPACITY TO SUE—MINORITY OF PLAINTIFF—WAIVER OF OBJECTIONS.** An objection to the minority of the plaintiff is waived by answer on the merits. *Kongsbach v. Casey*..... 643

PARTNERSHIP:

Evidence of agreement by incorporators to pay debts of former partnership, see **CORPORATIONS**, 1.

Mistake as to effect of withdrawal of partner as release by way of estoppel, see **ESTOPPEL**, 1.

Indemnity deposit by partner as limitation on liability, see **INDEMNITY**.

1. **PARTNERSHIP—FIRM NAME—FILING DESIGNATION.** Under Rem. & Bal. Code, § 8372, exempting partnerships in which the firm name contains all the names of the partners from the necessity of filing with the county clerk the designation of the firm with the true names of all the partners, plaintiffs, doing business under the name of "Hale-Tindall Co.," which contains the names of all the partners, are exempt from the requirements of the statute. *Hale v. City Cab, Carriage & Transfer Co.*..... 459
2. **PARTNERSHIP—FILING DESIGNATION—ACTIONS—CAPACITY TO SUE—WAIVER.** The objection that a partnership, doing business under an

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assumed name, cannot maintain an action because it had failed to file with the county clerk the designation of the firm with the names of all the partners, as required by Rem. & Bal. Code, § 8369, goes only to the capacity to sue, and is waived if not raised by demurrer or answer. *Hale v. City Cab, Carriage & Transfer Co.*..... 459

3. **PARTNERSHIP—DISSOLUTION—RETIREMENT AND RELEASE OF PARTNER—EVIDENCE—SUFFICIENCY.** Where partners had contracted in writing for the cutting of timber owned by them, a release of one of the partners is not shown by evidence that some months later he sold his interest in the subject-matter to his copartner, gave notice thereof and that the partnership was dissolved, and that the other party to the contract continued the work, looking for his pay to the other partner, against whom he carried the account on his books, where it appears that the account happened to be so carried because payments of checks were made by such partner, and where no release was given or talked about. *Western Lumber & Pole Co. v. Joslyn* 524

PASSENGERS:

Carriage of, see **CARRIERS.**

PAYMENT:

Promise to pay as revival of discharged debt, see **BANKRUPTCY.**

Failure to present checks for payment, see **BILLS AND NOTES, 7.**

Of former partnership debts by corporation, see **CORPORATIONS, 1.**

Of award in condemnation proceeding, see **EMINENT DOMAIN, 7, 9.**

Guaranty of payment of note as barred by limitation, see **LIMITATION OF ACTIONS.**

As defense in action to enforce logger's lien, see **LOGS AND LOGGING, 2.**

Application of partial payments for materials furnished contractor, see **MECHANICS' LIENS, 6.**

1. **PAYMENT—CONDITIONS—CONTRACTS—CONSTRUCTION.** In an action to recover a balance due on account, there is sufficient evidence of payment in full, where it appears that the plaintiff traded to the defendant land for an automobile owned by him, in consideration of which it was agreed that the balance due on the account should not be paid "until and unless" the land was sold for at least \$2,000, and if the land was not sold for said sum, that the exchange should be in full satisfaction of the claim; and there can be no recovery where the court finds that due diligence was used to sell the land but it could not be sold for \$2,000 or any other sum; since the payment was conditioned wholly and finally upon the sale of the land. *Seattle Automobile Co. v. Stimson*..... 548

PERFORMANCE:

Compelling performance of contract, see **SPECIFIC PERFORMANCE.**

PERSONAL INJURIES:

See NEGLIGENCE.

Review of instructions in action for as dependent on prejudicial nature of error, see APPEAL AND ERROR, 36, 37.

To passenger, see CARRIERS.

Excessive damages, see DAMAGES, 2-4.

Caused by explosives, see EXPLOSIVES.

To employee, see MASTER AND SERVANT.

To person on city street, see MUNICIPAL CORPORATIONS, 26-28.

To servant of city, see MUNICIPAL CORPORATIONS, 29, 30.

From failure to guard frogs and switches, see RAILROADS.

To person on or near street railroad track, see STREET RAILROADS.

From fall on stairway, see THEATERS AND SHOWS.

PLEADING:

See ESTOPPEL, 4; QUIETING TITLE; SPECIFIC PERFORMANCE, 2, 3.

Amendment on appeal, see APPEAL AND ERROR, 15, 16.

Review of rulings on as dependent on prejudicial nature of error, see APPEAL AND ERROR, 29.

On note, see BILLS AND NOTES, 9.

Amendment of on appeal from justice court as harmless error, see CRIMINAL LAW, 27.

Allegations of cross-complaint, see DIVORCE, 2, 3.

Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.

1. PLEADING—ANSWER—INCONSISTENT DEFENSES. A general denial of the execution of a note is not inconsistent with an affirmative defense alleging the securing of defendant's signature by fraud while intoxicated, and want of consideration. *Gibson v. Feeney*..... 531
2. PLEADINGS—DEMURRER—WAIVER OF OBJECTIONS. Error in overruling a demurrer to a complaint is waived by answer and trial on the merits. *Johnson v. Johnson*..... 113

POSSESSION:

Of mortgaged property, see CHATTEL MORTGAGES, 2.

POWER OF ATTORNEY:

See PRINCIPAL AND AGENT, 1.

POWERS:

Of corporation, see CORPORATIONS, 7.

Of court in assessing property benefited, see MUNICIPAL CORPORATIONS, 10.

Of eminent domain commissioners in apportioning cost of improvement, see MUNICIPAL CORPORATIONS, 13, 14.

Of city to erect bridge over navigable waters, see NAVIGABLE WATERS.

Of agent, see PRINCIPAL AND AGENT, 1.

Of trustee, see TRUSTS, 1.

PRACTICE:

See **APPEAL AND ERROR**; **CERTIORARI**, 1; **CONTINUANCE**; **CRIMINAL LAW**; **DIVORCE**; **EVIDENCE**; **EXECUTION**; **JUDGMENT**; **NEW TRIAL**.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 25-40.

Ground for estoppel, see **ESTOPPEL**, 1.

PREMISES:

Injuries from dangerous premises, see **NEGLIGENCE**; **THEATERS AND SHOWS**.

PRESCRIPTION:

Obtaining water rights by, see **WATERS AND WATER COURSES**, 1.

PRESENCE:

Of accused at trial, see **CRIMINAL LAW**, 10-12.

PRESENTMENT:

Of bill or note, see **BILLS AND NOTES**, 7.

Failure to present checks given for amount of claims, see **LOGS AND LOGGING**, 2.

Of claim for injuries, see **MUNICIPAL CORPORATIONS**, 29, 30.

PRESUMPTIONS:

On appeal, see **APPEAL AND ERROR**, 2, 24, 25

As to estoppel, see **ESTOPPEL**, 3.

Community nature of property, see **HUSBAND AND WIFE**, 2.

As to negligence, see **MASTER AND SERVANT**, 24.

As to benefits from improvement, see **MUNICIPAL CORPORATIONS**, 19.

Upon relinquishment of homestead pending contest, see **PUBLIC LANDS**, 1, 2.

PRICE:

Right to enjoin sale of corporate property at inadequate price, see **CORPORATIONS**, 8.

Inadequacy of as ground for vacation of execution sale, see **EXECUTION**, 2.

PRINCIPAL AND AGENT:

See **BROKERS**.

Corporate officers and agents, see **CORPORATIONS**, 2-5.

Authority of agent to execute contract of sale, see **FRAUDS, STATUTE OF**.

Evidence to establish relation of, see **MASTER AND SERVANT**, 29, 30.

Delivery to agent of duplicate statement of materials furnished contractor, see **MECHANICS' LIENS**, 8.

PRINCIPAL AND AGENT—CONTINUED.

1. **PRINCIPAL AND AGENT—AUTHORITY—POWER OF ATTORNEY—CONSTRUCTION.** A power of attorney for the transaction of the business of a firm, and to be "my personal representative in . . . any other matters that may arise during my absence demanding personal attention," authorizes the agent to conclude negotiations relating to a sale outside of the firm business, especially when construed in connection with correspondence relating to the subject. *Mauk v. Lee*..... 184
2. **PRINCIPAL AND AGENT—CONTRACTS OF AGENT—RATIFICATION—CONSIDERATION.** No new consideration is necessary for the ratification of the unauthorized contract of an agent, the consideration of the original contract being sufficient. *McLeod v. Morrison & Eshelman* 683

PRINCIPAL AND SURETY:

See **INDEMNITY**.

Liability of surety on contractor's bond for wages due laborer, see **MUNICIPAL CORPORATIONS**, 1.

1. **PRINCIPAL AND SURETY—RIGHTS OF SURETY—EXHAUSTION OF REMEDY AGAINST PRINCIPALS.** Where the principals gave indemnity to a surety company guaranteeing a building contract, the surety company has the right to exhaust the indemnity and liability of the principals before recourse to the liability of a volunteer surety for the principals. *Empire State Surety Co. v. Ballou*..... 76

PRIORITIES:

Of mechanics' liens, see **MECHANICS' LIENS**, 7.

Of tax title, see **TAXATION**, 1.

PROCESS:

Effect of appearance, see **APPEARANCE**.

Review of order denying motion to quash summons, see **CERTIORARI**.

Liability for false return of service, see **SHERIFFS AND CONSTABLES**.

In foreclosure of tax lien, see **TAXATION**, 2.

PROFITS:

Construction of contract for division of profits in company, see **CONTRACTS**, 1.

PROHIBITION:

Of traffic in intoxicating liquors, see **INTOXICATING LIQUORS**.

PROMISE:

Revival of discharged debt by new promise, see **BANKRUPTCY**.

Guaranty of payment of note, see **GUARANTY**.

To pay note as barred by limitation, see **LIMITATION OF ACTIONS**.

PROMISSORY NOTES:

See **BILLS AND NOTES.**

PROPERTY:

Mortgage of personal property, see **CHATTEL MORTGAGES.**

Purchase or sale by corporation, see **CORPORATIONS, 2, 8.**

Award and disposition on divorce, see **DIVORCE, 4, 5.**

Taking or damaging for public use, see **EMINENT DOMAIN.**

Separate or community property, see **HUSBAND AND WIFE, 1-3.**

Recovery of value of improvements on breach of contract to convey, see **IMPROVEMENTS.**

Assessment for public improvement, see **MUNICIPAL CORPORATIONS, 6-24.**

PROSTITUTION:

1. **PROSTITUTION—PLACING FEMALE IN HOUSE—ELEMENTS OF OFFENSE.** Physical restraint is not an essential element of the crime of placing a female in a house of prostitution. *State v. Stone*..... 625
2. **SAME—PREVIOUS UNCHASTITY—EVIDENCE—MATERIALITY.** Upon a prosecution for placing a female in charge of another for the purposes of prostitution, the previous unchastity of the prosecutrix is not material, except as affecting her credibility as a witness. *State v. Stone*..... 625
3. **PROSTITUTION—PLACING FEMALE IN HOUSE—EVIDENCE—COMPETENCY.** Upon a prosecution for placing a female in charge of another for the purpose of prostitution, evidence tending to show the character of the house as a house of prostitution is competent. *State v. Stone*..... 625
4. **PROSTITUTION—PLACING FEMALE IN HOUSE—EVIDENCE—CORROBORATION—SUFFICIENCY.** Upon a trial for placing a female in charge of another for the purposes of prostitution, the evidence of the prosecutrix that defendant took her to his house and introduced her to his wife and that she stayed there several weeks as a prostitute, is sufficiently corroborated, as required by Rem. & Bal. Code, § 2443, where several witnesses testified that the house was a house of prostitution conducted by the defendant and his wife. *State v. Stone* 625

PROXIMATE CAUSE:

Of injury to servant, see **MASTER AND SERVANT, 14.**

Of injury by collision between vehicle and street car, see **STREET RAILROADS, 3.**

PUBLIC LANDS:

1. **PUBLIC LANDS—HOMESTEAD—RELINQUISHMENT—CONTESTS—PRESUMPTION.** The presumption that a homestead relinquishment pending a contest was due to the contest is overcome where it was shown that the relinquishment was decided upon without notice of the com-

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- test, and instead of being a procuring cause, had rather a deterrent effect. *Kendall v. Long*..... 62
2. PUBLIC LANDS—HOMESTEAD—RELINQUISHMENT—CONTESTS—PRESUMPTIONS—DISPOSITION—CONCLUSIVENESS. The presumption that a homestead relinquishment pending a contest is due to the contest does not attach where the contest was dismissed for the reasons that it was irregular, that no fees had been paid and that no notice was given; and failure to appeal from such a dismissal precludes the contestant from asserting the regularity of the contest in the courts. *Kendall v. Long*..... 62
3. PUBLIC LANDS—PROCEEDINGS OF LAND DEPARTMENT—REVIEW BY COURTS. A party aggrieved by a decision of the land department disposing of public lands should exhaust his remedies before the department, and the courts will not interfere in the absence of equity. *Kendall v. Long*..... 62
4. PUBLIC LANDS—SCHOOL LANDS—FEDERAL GRANT—CONSTRUCTION—GRANT IN PRAESENTI OR FUTURO. The Federal grant to the state of school sections 16 and 36, by 25 Stat. at L. 676, §§ 10 and 11, whereby the land was "hereby granted" to the state, was a grant *in praesenti*, vesting title in the state, although the land was unsurveyed, in view of the provision of § 11 that such land shall not be subject to preemption, homestead, or any other entry, whether surveyed or unsurveyed, but shall be reserved for school purposes only. *State v. Whitney* 473
5. SAME—SCHOOL LANDS—GRANTS—WITHDRAWAL FROM ENTRY—STATUTES—IMPLIED REPEAL—GENERAL ACT REPEALED BY SPECIAL ACT. The amendment of the general act of 1859, 11 Stat. at L. 385, which provided that school sections 16 and 36 shall be subject to the homestead or preemption claims of settlers where settlements have been or shall hereafter be made before survey of the lands in the field, by the act of 1891, 26 Stat. at L. 796, which added the provision for lieu sections by the states or territories, of other lands of equal acreage when such settlements have been or shall hereafter be made before the survey in the field, did not have the effect of impliedly repealing the special act of 1899, 25 Stat. at L. 676, granting *in praesenti* to the states of North and South Dakota, Montana, and Washington, school sections 16 and 36, and providing that the same shall not be subject to any entry whether surveyed or unsurveyed; as repeals by implication are not favored, and a special act will not be held to be impliedly repealed by a general law on the same subject, unless the intent to repeal is clearly manifest. *State v. Whitney*..... 473
6. PUBLIC LANDS—SCHOOL LANDS—GRANT TO STATE—COMPACT WITH STATES—EFFECT OF SUBSEQUENT ACT. The grant to the states of North and South Dakota, Montana and Washington, of school sec-

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tions 16 and 36, with the special provision that the same shall not be subject to any entry whether surveyed or unsurveyed, was a compact with the states that could not be affected by a subsequent act amending the general law applicable to such grants in other states, whereby settlements prior to the survey in the field were given precedence and the states compelled to accept lieu selections of the lands. *State v. Whitney*..... 473

7. **PUBLIC LANDS—STATE LANDS—SALE—CONTRACTS—VALIDITY—MISTAKE—DEEDS—STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 6680, providing that any sale or lease of state lands made by mistake, or not in accordance with law, shall be void and the contract or lease assumed thereon shall be of no effect and the holder of the contract required to surrender the same, applies only to executory contracts, and not to sales that have been fully executed by delivery of the state deed and full payment of the price. *State v. Ort*..... 130
8. **SAME—STATE DEED—VACATING—CHARACTER OF LAND—MISTAKE OF OFFICERS.** In the absence of fraud or connivance of the purchaser, the state cannot maintain an action to set aside its deed of state lands on the ground of mistake of its officers in determining that the character of the lands is agricultural, when in fact it contained more than one million feet of merchantable timber, and under the law could not be sold as agricultural land. *State v. Ort*..... 130

PUBLIC POLICY:

Agreement with attorney to promote divorce suit, see **ATTORNEY AND CLIENT**, 5.

PUBLIC USE:

Taking property for public use, see **EMINENT DOMAIN**.

QUALIFICATION:

Of experts, see **EVIDENCE**, 6.

QUESTION FOR JURY:

See **MASTER AND SERVANT**, 2, 3, 15, 18-23, 25, 27.

In criminal prosecutions, see **HOMICIDE**, 1.

In action for death of person struck by taxicab, see **MUNICIPAL CORPORATIONS**, 26, 27.

In action for injuries sustained by collision between street car and vehicle, see **STREET RAILROADS**.

QUIETING TITLE:

Limitation of action by purchaser of tax title, see **TAXATION**, 3.

1. **QUIETING TITLE—COMPLAINT—SUFFICIENCY.** The complaint in an action seeking equitable relief to set aside certain proceedings is insufficient as a suit to quiet title to the land where it contains no proper description of the land. *Silverstone v. Harn*..... 440

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**.

Appropriation of property, see **EMINENT DOMAIN**, 1-3, 6.

Injury to employee, see **MASTER AND SERVANT**, 26.

Assessment of franchise for benefits from improvement, see **MUNICIPAL CORPORATIONS**, 8.

In city streets, see **STREET RAILROADS**.

1. **RAILROADS—OPERATION—SWITCHES AND FROGS—STATUTES—EFFECT.**
Laws of 1899, p. 49, § 1, providing that any person or company operating a railroad is required on or before the first day of October, 1899, to guard frogs and switches, applies to railroads organized after the act went into effect. *Alberg v. Campbell Lumber Co.* 84
2. **SAME—APPLICATION OF STATUTES—"RAILROADS"—PRIVATE LOGGING ROAD.** Laws of 1899, p. 49, § 1, providing that any person or persons, railroad companies or corporations, owning or operating a railroad or railroads in this state, shall guard frogs and switches, applies to a logging road of a mill company used in getting out logs to the mill, and not engaged in public service as a common carrier. *Alberg v. Campbell Lumber Co.* 84
3. **RAILROADS—OPERATION—FROGS AND SWITCHES—LIABILITY—PARTIES—STATUTES—CONSTRUCTION.** Section 2 of the act of 1899 (Rem. & Bal. Code, § 8683), requiring railroad companies to guard frogs and switches, which provides that the company shall be liable for any damage received from a failure to comply with the provisions of the act "such damages to be recovered by the parties entitled to recover as provided" by specified sections of the code, which relate to actions for wrongful death by heirs and representatives, does not limit the right of action to injuries from which death results, the object being only to extend the liability to actions for wrongful death. *Alberg v. Campbell Lumber Co.* 84

RAPE:

Election between offenses, see **CRIMINAL LAW**, 13.

1. **RAPE—"INTERCOURSE"—EVIDENCE—SUFFICIENCY.** A conviction of statutory rape is sustained by the testimony of the prosecutrix that the defendant had "intercourse" with her, where it appears that she meant sexual intercourse and fully comprehended her statements. *State v. Workman.* 292
2. **RAPE—PREVIOUS CHASTE CHARACTER—REPUTATION—EVIDENCE—ADMISSIBILITY.** In a prosecution for statutory rape under Rem. & Bal. Code, § 2436, relating to carnal knowledge of a female of previous chaste character between fifteen and eighteen years of age, evidence is admissible on the part of the defense of the previous general reputation of the prosecutrix as to unchastity, as going to her credibility as a witness, but is not admissible to prove her unchaste condition. *State v. Workman.* 292

RAPE—CONTINUED.

3. **RAPE—EVIDENCE—CORROBORATION—SUFFICIENCY.** In a prosecution for statutory rape, evidence that the defendant had admitted a similar act with the prosecutrix is sufficient corroboration of her testimony, and any doubt as to the meaning of the language used in the admissions raises a question for the jury. *State v. Workman*... 292
4. **RAPE—CORROBORATION—EVIDENCE—SUFFICIENCY.** In a prosecution for rape, the testimony of the prosecutrix that she was violently assaulted by the defendant is not sufficiently corroborated, where she allowed the defendant to escort her home, invited him in and entertained him at luncheon with her mother, without making any complaint, the only corroboration being the testimony of her mother that when they arrived her dress was pulled out of her belt, hair on sideways, and "their faces pretty red on one side." *State v. Roberts* 503

RATIFICATION:

- Of broker's contract to sell real estate, see **BROKERS**, 2, 3.
- Of acts of corporate officers, see **CORPORATIONS**, 3.
- Of act of agent, see **PRINCIPAL AND AGENT**, 2.

REAL ESTATE AGENTS:

- See **BROKERS**.

REAL PROPERTY:

- See **PUBLIC LANDS**.
- Boundaries of, see **BOUNDARIES**.
- Sale by agent, see **BROKERS**.
- Condemnation of, see **EMINENT DOMAIN**.
- Sale of, see **EXECUTION; VENDOR AND PURCHASER**.
- Exemption of, see **HOMESTEAD**.
- Improvements placed on, see **IMPROVEMENTS**.
- Lease of, see **LANDLORD AND TENANT**.
- Recording titles, see **RECORDS**.
- Taxation of, see **TAXATION**.
- Property in trust, see **TRUSTS**.

REASONABLE DOUBT:

- Instructions, see **CRIMINAL LAW**, 20

REBUTTAL:

- Evidence in criminal prosecution, see **CRIMINAL LAW**, 5, 15-17.
- Evidence as to value of property taken, see **EMINENT DOMAIN**, 3.

RECEIVERS:

- Action by administrator for appointment of, see **LIFE ESTATES**.

RECORDS:

On appeal, see **APPEAL AND ERROR**, 7-11, 12, 24, 25.

Recording and filing mortgage on personal property, see **CHATTEL MORTGAGES**, 1.

Subject and title of act providing for record of deeds and mortgages, see **STATUTES**, 2.

Recording assignment of contract as condition precedent to rescission by vendee, see **VENDOR AND PURCHASER**, 3.

1. **RECORDS—OF MORTGAGES—SATISFACTION—ASSIGNMENT—FAILURE TO RECORD—BONA FIDE INCUMBRANCERS.** Rem. & Bal. Code, § 8800, providing for the assignment of mortgages and that, after an assignment has been recorded, the assignee may satisfy it of record, authorizes the record of assignments of mortgages, and thereunder and under Rem. & Bal. Code, § 8781, providing that all deeds, mortgages, and assignments of mortgages shall be recorded and shall thereafter be valid as against *bona fide* purchasers, subsequent *bona fide* incumbrancers may rely upon an unauthorized satisfaction by an original mortgagee whose assignee had failed to record his assignment. *Seattle National Bank v. Ally*..... 610
2. **RECORDS—REAL ESTATE—REGISTRATION UNDER TORRENS ACT—PROCEEDINGS—RIGHT TO DISMISSAL.** The superior court has no jurisdiction to try out conflicting titles and refuse the applicant a dismissal without prejudice, in a special proceeding to register land titles under the Torrens act, the act having provided (Rem. & Bal. Code, § 8834) that the superior court shall dismiss the proceeding if the title is not a proper one for registration which dismissal may be without prejudice, and that the applicant may dismiss at any time on terms fixed by the court, and *Id.*, §§ 8809 and 8823, providing for the registration only of such titles as are found to be in the applicant, with admitted liens or outstanding interests, and that the applicant proceeds at his peril if there are hostile or conflicting interests. *Krutz v. Dodge*..... 178

REGISTRATION:

Of voters, see **ELECTIONS**.

Of land under Torrens act, see **RECORDS**, 2.

REJECTION:

Of claim against estate, see **EXECUTORS AND ADMINISTRATORS**, 2, 3.

RELEASE:

See **COMPROMISE AND SETTLEMENT**.

Mistaken view as to effect of withdrawal of partner as release by estoppel, see **ESTOPPEL**, 1.

Use of deposit by partner to discharge claims as release from liability, see **INDEMNITY**.

Of partner, see **PARTNERSHIP**, 3.

RELEVANCY:

Of evidence in criminal prosecutions, see **CRIMINAL LAW**, 6.

RELINQUISHMENT:

Of homestead, see **PUBLIC LANDS**, 1, 2.

REMAND:

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 42.

REMOVAL OF CAUSES:

Change of venue or place of trial, see **VENUE**.

RENT:

See **LANDLORD AND TENANT**.

REPEAL:

Amendment of general law as repealing special act granting school lands to state, see **PUBLIC LANDS**, 5.

REPRESENTATION:

Of corporation by officers or agents, see **CORPORATIONS**, 2-6.

REPUTATION:

Necessity of establishing to show disposition of person assaulted, see **CRIMINAL LAW**, 7.

Evidence of in prosecution for rape, see **RAPE**, 2.

REQUEST:

For instructions, see **CRIMINAL LAW**, 24; **TRIAL**, 6.

RESCISSION:

Of contract for failure of consideration, see **EXCHANGE OF PROPERTY**.

Of contract for sale of land, see **VENDOR AND PURCHASER**.

RESIDENCE:

Alleging residence of defendant in cross-complaint, see **DIVORCE**, 3.

Delivery to residence of owner of duplicate statements of material furnished contractor, see **MECHANICS' LIENS**, 10-12.

Of defendant, determination, see **VENUE**.

RES IPSA LOQUITUR:

See **MASTER AND SERVANT**, 24.

RES JUDICATA:

See **JUDGMENT**, 3-6.

Judgment in condemnation proceedings, see **EMINENT DOMAIN**, 4, 5.

RESULTING TRUSTS:

See **TRUSTS**, 3.

REVENUE:

See **TAXATION**.

REVIEW:

See **APPEAL AND ERROR; CERTIORARI**.

In criminal prosecution, see **CRIMINAL LAW**, 23-29.

REVIVAL:

Of discharged debt by new promise, see **BANKRUPTCY**.

REVOCAION:

Of license to abutting owners to plant shade trees in street, see **MUNICIPAL CORPORATIONS**, 25.

RIPARIAN RIGHTS:

See **WATERS AND WATER COURSES**, 1.

Conclusiveness of former judgment determining rights, see **JUDGMENT**, 3.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 11-13, 19.

ROBBERY:

Murder in commission of robbery, see **HOMICIDE**, 3.

RULES OF COURT:

Failure to observe as harmless error, see **APPEAL AND ERROR**, 27.

SAFE PLACE TO WORK:

See **MASTER AND SERVANT**, 1, 3, 4.

For employee of city, see **MUNICIPAL CORPORATIONS**, 30.

SALES:

Application of proceeds of on note as affecting negotiability, see **BILLS AND NOTES**, 3.

Possession and sale of goods by mortgagor as fraud on creditors, see **CHATTEL MORTGAGES**, 2.

Construction of sale contract, see **CONTRACTS**, 1, 2.

Of corporate property, see **CORPORATIONS**, 8.

Of liquor to Indian, see **CRIMINAL LAW**, 8.

On execution, see **EXECUTION**.

Negligent sale of explosive, see **EXPLOSIVES**.

Fraud in inducing sale, see **FRAUD**.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

Of state lands, see **PUBLIC LANDS**, 7, 8.

Of realty, see **VENDOR AND PURCHASER**.

1. **SALES—CONTRACTS—CONSTRUCTION.** A contract to purchase certain sheep unconditionally, and also to purchase three thousand

SALES—CONTINUED.

lambs, with a ten-day option to the vendor to sell the lambs to other persons, after which time the lambs could not be sold to any other person, is a binding contract to sell the lambs to the purchasers, subject only to the ten-days' option to sell to other persons. *Rothrock v. Hunter*..... 543

2. **SALES—IDENTITY OF BUYER—EVIDENCE—SUFFICIENCY.** The sale of goods to defendant corporation is sufficiently shown where the order was given by its president, who was also an officer of another corporation doing business in the same office, it made the first payment thereon by its check, the goods were charged to it, and no claim was made until suit brought that the sale was made to the other corporation whose business had been confused with that of the vendee. *Sumner Iron Works v. Winkleman Lumber Co.*..... 14

3. **SALES — BREACH OF CONTRACT — DAMAGES — EVIDENCE OF MARKET VALUE.** Upon breach of a contract to sell lambs to be delivered at a certain place, at which there was no market value for them, other evidence of their value is competent, and experienced sheep men may testify as to their value without testifying in detail to their market value at other places, or the cost of transportation. *Rothrock v. Hunter*..... 543

SATISFACTION:

See COMPROMISE AND SETTLEMENT; PAYMENT.

Of recorded mortgage assignment, see RECORDS, 1.

SCHOOL LANDS:

See PUBLIC LANDS, 4-6.

SCHOOLS AND SCHOOL DISTRICTS:

Mandamus to compel state auditor to issue warrant for school bonds purchased, see MANDAMUS, 3.

Federal grant of school lands to state, see PUBLIC LANDS, 4-6.

1. **SCHOOLS AND SCHOOL DISTRICTS — INDEBTEDNESS — LIMITATIONS.** Where two school districts are each indebted in excess of two per cent of their taxable property as shown by the last assessment, and are consolidated and the consolidated district issues bonds in excess of three per cent of its taxable property, the issue is void, as being in excess of the constitutional limitation of five per cent of the taxable property in the consolidated district, as each district, under Rem. & Bal. Code, § 4446, is subject to taxation as a separate entity for the purpose of paying its prior indebtedness. *State ex rel. Zylstra v. Clausen*..... 324

SEALS:

Broker's contract under seal, see BROKERS, 3.

SECONDARY EVIDENCE:

In civil actions, see EVIDENCE, 3.

SELF-DEFENSE:

See HOMICIDE, 2.

SENTENCE:

Amount of fine for violation of injunctive order, see CONTEMPT, 4.
In criminal prosecutions, see CRIMINAL LAW, 29.

SEPARATION:

Construction of separation agreement, see HUSBAND AND WIFE, 4.

SERVICE:

Of process in tax foreclosure proceeding, see TAXATION, 2.

SETTLEMENT:

See COMPROMISE AND SETTLEMENT.

SHERIFFS AND CONSTABLES:

1. **SHERIFFS AND CONSTABLES—FALSE RETURN—LIABILITY—DEFENSES—ESTOPPEL.** A sheriff and his official bondsmen are not liable for making a false return of service whereby judgment of divorce was wrongfully obtained against a wife, where the wife, when presently informed of the divorce, did not move to set it aside, but entered into a contract for the payment of alimony referable to the decree, and only sought to hold the sheriff where after some years the husband failed to make the payments for her support. *Morgan v. Fidelity and Deposit Co.*..... 649

SIGNALS:

Used in employee's work, see MASTER AND SERVANT, 8, 10, 22.

SIGNATURES:

Comparison of by experts, see EVIDENCE, 6.

SODOMY:

Information for assault with intent to commit, see ASSAULT, 1.
Sentence not excessive, see CRIMINAL LAW, 29.

1. **SODOMY—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to sustain a conviction for sodomy, notwithstanding certain exaggerations in the testimony of the prosecuting witness, where he was corroborated as to the overt act by two other witnesses. *State v. Douglass* 71

SPECIFIC PERFORMANCE:

Of trust agreement, see TRUSTS, 4.

1. **SPECIFIC PERFORMANCE—ACTIONS—LACHES.** There is no laches which will be a defense to specific performance where the vendee did

SPECIFIC PERFORMANCE—CONTINUED.

all that he could to secure a deed, and the delay was at the solicitation of the vendor. *McLeod v. Morrison & Eshelman*..... 683

2. **SPECIFIC PERFORMANCE—COMPLAINT—SUFFICIENCY.** A general allegation in a complaint for specific performance that the plaintiffs have performed all of the agreements on their part to be performed, is sufficient, as against a general demurrer, to show that specific provisions of the contract had been complied with. *Adams v. Canutt* 422
3. **SPECIFIC PERFORMANCE—DEFENSES—PLEADING.** In an action for specific performance, in which the complaint alleged performance by the plaintiff of all the conditions of the contract upon its part to be performed, nonperformance of conditions is matter of defense, and cannot be urged on general demurrer to the complaint. *Adams v. Canutt* 422
4. **SPECIFIC PERFORMANCE—TENDER—WAIVER.** In seeking specific performance, a tender of the last deferred payment on a land contract is excused by the positive statement that it would be useless. *McLeod v. Morrison & Eshelman*..... 683

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 7-8, 11.
Duplicate statement to owner of material furnished to contractor, see **MECHANICS' LIENS**.

STATES:

Pleading estoppel against, see **ESTOPPEL**, 4.
Mandamus to state officers, see **MANDAMUS**, 3.
Public lands, see **PUBLIC LANDS**, 4-8.

STATUTES:

Construction of statute defining negotiable instruments, see **BILLS AND NOTES**, 1.
Construction of statute defining bribery of officers, see **BRIBERY**, 1.
Construction of statutes providing for filing and recording of mortgage, see **CHATTEL MORTGAGES**, 1.
Construction of statute providing for presence of accused at trial, see **CRIMINAL LAW**, 11.
Construction of statute defining false registration, see **ELECTIONS**.
Statute of frauds, see **FRAUDS, STATUTE OF**.
Conviction of lesser degree included in offense, see **INDICTMENT AND INFORMATION**, 2.
Construction of local option law as to gifts in streets of dry town, see **INTOXICATING LIQUORS**, 1.
Of limitation, see **LIMITATION OF ACTIONS**.
Contractor's bond, liability of surety for wages of laborer, see **MUNICIPAL CORPORATIONS**, 1.
Construction of statute providing for filing claims against city for damages, see **MUNICIPAL CORPORATIONS**, 29.

STATUTES—CONTINUED.

Relating to school lands and grants to state, see PUBLIC LANDS, 5, 6.
 Construing statute providing for surrender of contract for state lands on ground of invalid sale, see PUBLIC LANDS, 7.

Laws requiring guards for frogs and switches, see RAILROADS.

1. **STATUTES—TITLE AND SUBJECT OF ACTS—INTOXICATING LIQUORS—LOCAL OPTION.** The local option law of 1909, Rem. & Bal. Code, § 6292, entitled an act to provide for the submission of the question whether the "sale" of intoxicating liquors shall be licensed or prohibited, and providing for the enforcement of the result of elections and defining offenses thereunder, relates to but one subject sufficiently expressed in its title; and penalties for the "giving away" of liquor within a dry unit, except to guests in private houses, are germane to the subject; the word "sale" in the title not being determinative of the acts to be punished. *State v. Jones*..... 229
2. **STATUTES—TITLE AND SUBJECTS—RECORDING ACTS—MORTGAGES—ASSIGNMENTS.** The title of an act to amend a section "concerning the recording of deeds and mortgages," is broad enough to include a provision relating to the recording of assignments of mortgages. *Seattle National Bank v. Ally*..... 610

STOCK:

Corporate stock, see CORPORATIONS.

STOCKHOLDERS:

Construction of agreement with stock subscriber for division of profits, see CONTRACTS, 1.

Of corporations, see CORPORATIONS, 1, 6, 8, 9.

STREET RAILROADS:

Assessment of franchise for benefits from improvement, see MUNICIPAL CORPORATIONS, 9.

1. **STREET RAILWAYS—NEGLIGENCE—COLLISION WITH PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** In an action for personal injuries sustained by a pedestrian run down from behind by a street car, the negligence of the defendant and the contributory negligence of the plaintiff are for the jury, where it appears that plaintiff in the daytime was lawfully using the street car tracks, there being no sidewalks in the street, that he crossed to the east tracks upon meeting a car on the west tracks, and then looked back where he could see for a distance of nine hundred feet and saw no car approaching, and after going about thirty or forty feet, was struck by a car going at a high rate of speed which gave no alarm in time to enable him to escape; although on the evidence offered by the defendant, the jury might have found that the accident happened in an entirely different way without any fault of the defendant; since plaintiff was not a trespasser and the motorman would

STREET RAILROADS—CONTINUED.

not be justified in running him down without warning. *Mallett v. Seattle, Renton & Southern R. Co.*..... 251

2. **STREET RAILWAYS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** It is not contributory negligence *per se* to fail to look and listen before driving across a street car track at a city street crossing; and the question is for the jury where the car was some distance away running at a high rate of speed, and the wagon would have cleared the track if the car had slowed down or been going at a reasonable rate of speed. *Morris v. Seattle, Renton & Southern R. Co.*..... 691

3. **SAME—PROXIMATE CAUSE.** The contributory negligence of the driver of a wagon in crossing a street car track at a city street crossing will not preclude a recovery if the motorman could have stopped the car in time to avoid the accident had it been going at a reasonable rate of speed; since the right of way at the crossing is not absolute, and the motorman's negligence was the proximate cause. *Morris v. Seattle, Renton & Southern R. Co.*..... 691

STREETS:

See MUNICIPAL CORPORATIONS.

SUBLETTING:

See LANDLORD AND TENANT, 2, 3.

SUBSCRIPTIONS:

Construction of agreement with stockholder for division of profits, see CONTRACTS, 1.

SUMMONS:

Waiver of, see APPEARANCE.

Review of order denying motion to quash, see CERTIORARI.

SUPERINTENDENCE:

Liability of master for lack of, see MASTER AND SERVANT, 5, 9.

SUPERSEDEAS:

On appeal, see APPEAL AND ERROR, 5.

SUPPORT:

Nonsupport as ground for divorce, see DIVORCE, 1.

SURFACE WATERS:

See WATERS AND WATER COURSES, 2.

SURPRISE:

As ground for impeaching witness, see WITNESSES, 7.

SURVEYS:

Liability of surveyor for erroneous survey, see **BOUNDARIES**, 3-5.

SWITCHES:

Duty of railroad to guard, see **RAILROADS**.

TAXATION:

Action by administrator for receiver and to compel payment of taxes, see **LIFE ESTATES**.

Assessment for local improvements, see **MUNICIPAL CORPORATIONS**, 6-24.

Bonds in excess of constitutional limitation, see **SCHOOLS AND SCHOOL DISTRICTS**.

1. **TAXATION—TAX TITLE—PRIORITY—EASEMENTS.** Under Rem. & Bal. Code, § 9230, providing that a tax lien shall have priority over all other liens or claims, a tax foreclosure and sale passes the fee freed from a prior easement for a private road, where the owner of the easement prior to foreclosure did not seek a segregation of the tax as to the strip of land affected by the easement. *Hanson v. Carr*. 81
2. **TAXATION—FORECLOSURE—WANT OF PROCESS.** A tax foreclosure proceeding without the service of any process is without jurisdiction and void. *Silverstone v. Harn*..... 440
3. **TAXATION—REMEDIES OF PURCHASERS — QUIETING TITLE — LIMITATIONS.** A tax title purchaser who has paid all the taxes since foreclosure may maintain an action to quiet title within ten years from the date of foreclosure. *Hanson v. Carr*..... 81
4. **TAXATION—TAX DEED—ACTION TO SET ASIDE—LIMITATIONS.** An action to set aside a tax judgment title on the ground that the tax foreclosure judgment was fraudulently obtained and entered without jurisdiction, and that plaintiff did not know of the fraud until shortly before the commencement of the action, is barred, if it is not commenced within three years from the date of the deed, by Rem. & Bal. Code, § 162, requiring actions to set aside tax deeds to be commenced within such time. *Fleming v. Stearns*..... 655

TEAMS:

Lien for services of in getting out logs, see **LOGS AND LOGGING**, 1.

TENDER:

Of payment on contract, see **SPECIFIC PERFORMANCE**, 4.

Of deed, see **VENDOR AND PURCHASER**, 1.

Of purchase price by vendee, see **VENDOR AND PURCHASER**, 2.

Of quitclaim deed as condition precedent to rescission by vendee, see **VENDOR AND PURCHASER**, 3.

TERMINATION:

Adoption of local option as terminating lease of premises used for saloon, see **LANDLORD AND TENANT**, 1.

Of contract of employment, see **WORK AND LABOR**.

THEATERS AND SHOWS:

Maintenance of step at exit of theater, see **NEGLIGENCE**, 1.

1. **THEATERS AND SHOWS—INJURIES TO SPECTATORS—DANGEROUS PREMISES—BACK STAIRWAY—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE.** A spectator intending to witness a public exhibition cannot recover for injuries sustained in a fall on a back stairway leading to the back of the hall and stage, which was unlighted and wet and slippery, and obstructed by vines, where she knew it was not the main entrance to the hall, and she passed a safe, well-lighted entrance with notice of the dangerous condition of the other way; since she assumed the risks and was guilty of contributory negligence. *Hendershott v. Modern Woodmen of America*..... 155

THREATS:

Evidence of in prosecution for homicide, see **CRIMINAL LAW**, 1.

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TIME:

Duration of nonsupport sufficient for granting divorce, see **DIVORCE**, 1.
Filing declaration of homestead, see **HOMESTEAD**.

For delivery of duplicate statements to owner of material furnished to contractor, see **MECHANICS' LIENS**, 3, 5, 9, 12.

For objecting to local assessment, see **MUNICIPAL CORPORATIONS**, 22.
As essence of contract for sale of realty, see **VENDOR AND PURCHASER**, 2.

TITLE:

Acquired by condemnation, see **EMINENT DOMAIN**, 7, 9.

Property of husband held in trust, see **HUSBAND AND WIFE**, 1.

Of widow to homestead set aside from community property, see **HUSBAND AND WIFE**, 3.

Removal of cloud, see **QUIETING TITLE**.

Registering land titles under Torrens act, see **RECORDS**, 2.

Statutes, see **STATUTES**.

Tax titles, see **TAXATION**, 1.

TORTS:

See **FRAUD; NEGLIGENCE**.

Measure of damages, see **DAMAGES**.

Of employers, see **MASTER AND SERVANT**.

Of city, see **MUNICIPAL CORPORATIONS**, 29, 30.

Effect of verdict exonerating codefendant, see **TRIAL**, 7.

TREES:

Rights of abutting owners as to shade trees planted in street, see **MUNICIPAL CORPORATIONS**, 25.

TRIAL:

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 1-4, 24.

Review of verdicts and findings, see **APPEAL AND ERROR**, 20-24.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 25-40.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 7-11, 24, 25.

Instructions as to damages for wrongful ejection of passenger, see **CARRIERS**, 1.

Continuance of, see **CONTINUANCE**.

Of criminal prosecution, see **CRIMINAL LAW**.

Instructions in prosecution for selling liquor in dry unit, see **INTOXICATING LIQUORS**, 4.

For personal injuries, see **MASTER AND SERVANT**.

Instructions in action for injury to servant, see **MASTER AND SERVANT**, 26.

Instructions in action for negligent driving of automobile, see **MUNICIPAL CORPORATIONS**, 28.

Place of trial, see **VENUE**.

Examination of witnesses, see **WITNESSES**.

1. **TRIAL—VIEW BY JURY—INSTRUCTIONS.** Upon a view of premises, it is not error to instruct that the jury knows absolutely what they see, and are to use their senses, and need not believe the testimony of witnesses if they testified to anything which the jury knows to be false. *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*..... 663
2. **TRIAL—EXAMINATION OF WITNESSES—EXCLUSION OF WITNESSES.** It is not an abuse of discretion to grant plaintiff's request for the exclusion of defendant's witnesses, where it was indicated that a like request by defendant would have been granted if it had been made. *Wiles v. Northern Pac. R. Co.*..... 337
3. **TRIAL—MISCONDUCT OF ATTORNEY—IMPROPER ARGUMENT.** It is improper for counsel in argument to discuss the legal effect of the answer to special interrogatories, or their legal bearing upon the general verdict. *Snider v. Washington Water Power Co.*..... 598
4. **TRIAL—MOTION FOR NONSUIT—PROVINCE OF COURT.** Upon a motion for a nonsuit, the evidence must be construed most favorably to the plaintiff. *King v. Page Lumber Co.*..... 123
5. **TRIAL—NONSUIT—WEIGHT OF EVIDENCE.** In passing on a motion for a nonsuit, where plaintiff's evidence was vague, the court is

TRIAL—CONTINUED.

justified in taking into consideration expert evidence that plaintiff's mind had been affected by the accident. *Morris v. Seattle, Renton & Southern R. Co.*..... 691

6. TRIAL—INSTRUCTIONS—REQUESTS. Error cannot be predicated upon the refusal to give an instruction which was dictated to the court stenographer without calling the court's attention to the same at the time, and which was not written, marked refused, and filed with the clerk as part of the instructions offered by the appellant, in view of the statutory requirement that the instructions shall be reduced to writing, and the rules of court requiring proposed instructions to be in writing and filed in the cause and handed to the court. *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*..... 663
7. TRIAL—JOINT LIABILITY—VERDICT EXONERATING CODEFENDANT. In an action for damages to property by blasting, a verdict exonerating a codefendant does not relieve the other defendants, where it appears that such codefendant, a contractor, had nothing to do with the work, but simply loaned men to the other defendants to take charge of the blasting. *Norwegian Danish Methodist Episcopal Church v. Home Telephone Co.*..... 511

TRUSTS:

Community or separate nature of property held in trust, see HUSBAND AND WIFE, 1.

Trust deeds, see MORTGAGES.

1. TRUSTS—DECLARATION OF TRUST—CONSTRUCTION—POWER OF TRUSTEE. A declaration of trust to hold, manage or sell lands purchased for speculation, and subject to a mortgage, at such time and price and on such terms as shall to the trustee seem best for the interests of the subscribers, authorizes the trustee to deed the same to the mortgagee to save the costs of foreclosure, and preserving the equity or redemption for two years by an option to repurchase, where it became impossible to effect a sale or obtain from the subscribers the balance of the purchase price or pay off the mortgage, and the interests of the subscribers were best protected by such course. *Brinton v. Lewis-Littlefield Co.*..... 40
2. TRUSTS—ACTION TO DECLARE TRUST—RIGHTS OF PLAINTIFF—EQUITY. A mortgagee to whom a trustee had deeded the property, cannot be declared a trustee of the interest of a subscriber to the fund to purchase the property, where the subscriber refused to pay his part of the balance of the purchase price secured by the mortgage, or to reimburse the mortgagee for taxes and expenses incurred; since he who seeks equity must first do equity. *Brinton v. Lewis-Littlefield Co.*..... 40
3. TRUSTS—RESULTING TRUST—EVIDENCE—SUFFICIENCY. A resulting trust in lands will not be declared where the evidence is not clear,

TRUSTS—CONTINUED.

certain and conclusive and so cogent as to leave no reasonable doubt, especially where nearly fifty years elapsed since the transaction occurred. *Metcalfe v. Sackman*. 580

4. **TRUSTS—AGREEMENTS—CONSTRUCTION—DUTY OF TRUSTEE—SPECIFIC PERFORMANCE.** Under the rule of liberal construction of trust agreements to effectuate the intent of the parties, where an assignment of a state land contract to a bank as trustee authorized the state to receive from the bank the performance of the contract, the trustee to receive the deed from the state when the parties shall have made full payment, and to execute deeds of different portions of the lands to the respective parties interested in the trust, it is immaterial whether the parties make payment for the lands direct to the state or to the bank; and upon payments to the bank as trustee, it is the duty of the trustee to perform the state contract, receive the state deeds and fully execute the trust; and the bank cannot defeat specific performance on the theory that it acted only as agent in receiving the money. *Adams v. Canutt*. 422

5. **TRUSTS—AGREEMENT—AMBIGUITY—EVIDENCE — PAROL EVIDENCE TO EXPLAIN WRITING.** In such a case, the trust being admitted, parol evidence is admissible to make certain any of the uncertain, incomplete, or ambiguous terms of the assignment to the trustee; and the oral agreement of the trustee to make payments to the state, upon payment to it, does not contradict the terms of the trust. *Adams v. Canutt* 422

UNBROKEN PACKAGE:

Delivery of liquor in dry district, see **INTOXICATING LIQUORS**, 2.

UNITED STATES:

Consent to erect bridge over navigable water, see **NAVIGABLE WATERS**.
Grant of school lands to state, see **PUBLIC LANDS**, 4-6.

VACATION:

See **JUDGMENT**, 1, 2.
Decree of divorce, see **DIVORCE**, 4.
Of deed for failure of consideration, see **EXCHANGE OF PROPERTY**.
Of execution sale, see **EXECUTION**.
Mandamus to compel vacation of and entry of proper judgment on verdict, see **MANDAMUS**, 2.
Of deeds for state lands, see **PUBLIC LANDS**, 7, 8.
Limitation of action to vacate tax deed, see **TAXATION**, 4.

VALUE:

Evidence as to value of property taken for public use, see **EMINENT DOMAIN**, 1-3.
Liability of owner for value of improvements placed on property, see **IMPROVEMENTS**.
Evidence of market value on breach of contract, see **SALES**, 3.

VARIANCE:

In criminal prosecution, see **CRIMINAL LAW**, 18.

VENDOR AND PURCHASER:

See **EXCHANGE OF PROPERTY**.

Sale of land by broker, see **BROKERS**.

Breach of contract to procure title and pay claims due against land,
see **CONTRACTS**, 2.

Purchasers at sale on execution, see **EXECUTION**, 3.

Requirements of statute of frauds, see **FRAUDS**, **STATUTE OF**.

Sale of community property, see **HUSBAND AND WIFE**, 2.

Liability of owner for value of improvements on breach of contract
to convey lands, see **IMPROVEMENTS**.

Purchasers under void judgment as necessary parties in action to set
aside judgment, see **JUDGMENT**, 2.

Transfer of ownership of personal property, see **SALES**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

Purchasers at tax sale, see **TAXATION**, 1, 3.

Sale by trustee, see **TRUSTS**, 1.

1. **VENDOR AND PURCHASER—CONTRACT—FORFEITURE—RESCISSION BY VENDOR—TENDER OF DEED.** Where a contract for the sale of land contained no forfeiture clause, and all the installments except the last one were paid, the agreements to make the last payment and to deliver a conveyance are mutual and concurrent, and the vendor cannot rescind and claim a forfeiture where he did not tender a deed, and was not in a position to convey a good title until after the vendee had tendered the purchase price. *Katz v. Hathaway*.... 355
2. **VENDOR AND PURCHASER—CONTRACT—RESCISSION BY VENDEE—TENDER—EVIDENCE—SUFFICIENCY.** Under a contract of sale making time of the essence, in which the vendor agreed to furnish an abstract of title and deed within a specified time, the purchaser is entitled to rescind the contract where he made demand for the deed and tendered the purchase price to the vendor's authorized agent, the vendor being abroad, at the time fixed, and no deed or abstract was furnished until four days after demand and after notice of rescission. *Mauk v. Lee*..... 184
3. **SAME—RESCISSION BY VENDEE—CONDITIONS PRECEDENT.** Neither the recording of the assignment of a contract for the purchase of land, nor the tender of a quitclaim deed, are conditions precedent to a rescission of the contract on account of the default of the vendor in furnishing an abstract and deed. *Mauk v. Lee*..... 184
4. **VENDOR AND PURCHASER—CONTRACT—RESCISSION BY VENDEE—FRAUD—WIDTH OF STREET.** A contract may be rescinded by the vendee where the lot had no means of access except a street, represented by the vendors to be twenty-five feet wide, when in fact it was only fifteen feet, a fact materially affecting its value, and as

VENDOR AND PURCHASER—CONTINUED.

to which the vendee had no means of readily ascertaining the truth.
Kuehl v. Scott..... 318

5. **SAME—RESCISSION BY VENDEE—WHILE IN DEFAULT.** A contract for the sale of land may be rescinded by the vendee for fraudulent representations, if he acts promptly, although he is in default in a payment, where the vendors had not elected to declare a forfeiture or terminated the contract for such default. *Kuehl v. Scott*.... 318
6. **VENDOR AND PURCHASER—CONTRACT—BREACH—REMEDIES OF VENDEE—DAMAGES.** Where a contract for the conveyance of land is breached by the failure to pay off a claim against the land, the vendee may retain the land and sue for damages for breach of the contract, without offering to rescind. *McIntyre v. Johnson*..... 567

VENUE:

Foreclosure action, see **MORTGAGES**, 2.

1. **VENUE—RESIDENCE OF DEFENDANTS—DETERMINATION.** Upon application for a change of venue on the ground that the action is not commenced in the county of the defendants' residence, under Rem. & Bal. Code, §§ 207-209, the plaintiff may controvert the defendants' allegations as to their residence. *Critler v. Jacobson & Lindstrom* 322

VERDICT:

Deview on appeal, see **APPEAL AND ERROR**, 20, 21; **CRIMINAL LAW**, 26.
 Excessive damages for wrongful ejection of passenger, see **CARRIERS**, 2.
 Inadequate or excessive damages, see **DAMAGES**, 2-4.
 Setting aside, see **NEW TRIAL**, 3.
 Effect of verdict exonerating codefendant, see **TRIAL**, 7.

VERIFICATION:

Waiver of objections as to, see **INDICTMENT AND INFORMATION**, 1.

VICE PRINCIPALS:

See **MASTER AND SERVANT**, 6, 7.

VIEW:

By jury in civil action, see **TRIAL**, 1.

VOTERS:

False registration, see **ELECTIONS**.

WAIVER:

See **ESTOPPEL**.
 Error waived in appellate court, see **APPEAL AND ERROR**, 14.
 Of summons by pleading, see **APPEARANCE**.
 Construction of agreement waiving damages from regrade of lots, see **CONTRACTS**, 3.

WAIVER—CONTINUED.

- Of right of accused to be present at trial, see **CRIMINAL LAW**, 10.
- On appeal as to evidence admitted, see **CRIMINAL LAW**, 25.
- Objections to information, see **INDICTMENT AND INFORMATION**, 1.
- Of objections to local assessment, see **MUNICIPAL CORPORATIONS**, 22.
- Of objection to minority of plaintiff, see **PARTIES**.
- Of objections to maintenance of action by firm, see **PARTNERSHIP**, 2.
- Of objections to ruling on pleadings, see **PLEADING**, 2.
- Of tender of payment on contract, see **SPECIFIC PERFORMANCE**, 4.

WARNING:

- Of signals given in work, see **MASTER AND SERVANT**, 8.
- Instructing servant as to dangers of employment, see **MASTER AND SERVANT**, 17, 25.

WARRANTS:

- Mandamus to compel issuance of, see **MANDAMUS**, 3.

WASTE:

- Action by administrator for receiver to prevent waste, see **LIFE ESTATES**.

WATERS AND WATER COURSES:

See **NAVIGABLE WATERS**.

Conclusiveness of former judgment determining rights in, see **JUDGMENT**, 3.

Liability of city for impounding surface waters upon lots in making street improvement, see **MUNICIPAL CORPORATIONS**, 3-5.

1. **WATERS AND WATER COURSES—RIPARIAN RIGHTS—PRESCRIPTION.** Riparian rights to the waters of a creek are lost by adverse possession, where, for more than the statutory period, an upper proprietor, continuously appropriated and diverted the waters in good faith under a claim of right adverse to the lower owner. *Farwell v. Brisson* 305
2. **WATERS—DIVERSION—SURFACE WATERS—DAMAGES.** There is no liability for increasing the flow of surface water upon the land of another, where it is not cast upon the land in a concentrated and destructive body. *Wood v. Tacoma*..... 266

WIDOWS:

- Appraisal and setting aside homestead for, see **EXECUTORS AND ADMINISTRATORS**, 1.

WITNESSES:

- Absence of as ground for continuance, see **CONTINUANCE**, 2, 4.
- Testimony of accomplices, see **CRIMINAL LAW**, 2-4.
- Opinions, see **CRIMINAL LAW**, 7.

WITNESSES—CONTINUED.

Credibility of in criminal prosecution, see CRIMINAL LAW, 8.
 Experts, see EVIDENCE, 6.
 Corroboration of female in prosecution for rape, see RAPE, 3, 4.
 Exclusion of, see TRIAL, 2.

1. WITNESSES—EXAMINATION—LEADING QUESTIONS. It is discretionary to permit leading questions. *Seattle Automobile Co. v. Stimson* 548
2. WITNESSES—EXAMINATION—REPETITIONS. Where a matter has been fully gone into, it is not error to refuse to permit the witnesses to be further interrogated along the same lines. *State v. Malla-han* 21
3. WITNESSES—CROSS-EXAMINATION—DISCRETION—APPEAL—EXCEPTIONS. Error cannot be predicated upon allowing cross-examination of a party's own witness who was clearly hostile, nor where no exception was taken, the same being within the discretion of the trial court. *Rommen v. Empire Furniture Mfg. Co.*..... 48
4. WITNESSES—IMPEACHMENT—REPUTATION. Upon a prosecution for an assault upon a boy eleven years old with intent to commit sodomy, it is not error to refuse an offer to impeach the boy by showing that a physician had reported that he had syphilis and to inquire whether a blood test had been taken; there being no direct offer to prove that he did have the disease. *State v. Harsted*..... 158
5. WITNESSES—IMPEACHMENT—CONVICTION OF WITNESS. Under Rem. & Bal. Code, § 2290, it is competent to show on cross-examination that a witness for the accused had been convicted of disorderly conduct, as affecting her credibility. *State v. Stone*..... 625
6. WITNESSES—IMPEACHMENT—COLLATERAL ISSUES—PREJUDICE. In a prosecution for placing a female in a house of prostitution, in which the defendant's wife testified as to the good character of the house, and denied on cross-examination that she had stated to a collector that she had two girls in the house, it is error to impeach her by the testimony of the collector that she had made the statement, but only after moving to another house; since it is error requiring a reversal to allow one of the witnesses for the defendant to be impeached upon a collateral matter, and by an impeaching question that did not correspond with the impeaching evidence, the matter not relating to the offense charged and being incompetent and extremely prejudicial. *State v. Stone*..... 625
7. WITNESSES—IMPEACHING OWN WITNESS—SURPRISE. In an action for the death of a person run down by defendant's taxicab while the driver was on the way to his supper, where the plaintiff called the manager as a witness under the belief that he would testify that drivers were allowed to take their cars while going to their meals, and was surprised by his testimony that it was contrary to rules,

WITNESSES—CONTINUED.

it is competent for plaintiff to impeach the witness by the stenographer's evidence as to his testimony to the contrary given at the inquest. *Burger v. Taxicab Motor Co.*..... 676

WOODS AND FORESTS:

Loggers' liens, see LOGS AND LOGGING.

Rights of abutting owners as to shade trees planted in street, see MUNICIPAL CORPORATIONS, 25.

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

1. **WORK AND LABOR—CONTRACTS—PERFORMANCE OR BREACH—TERMINATION—DAMAGES—MEASURE.** Under a contract to work for one year, the employee to forfeit all pay if he breached the contract, and to receive no compensation while sick or disabled, in an action for the compensation and wrongful discharge, a verdict that he was not damaged, limited to the sum due at the time he quit, is warranted, where there was evidence that he quit when sick and disabled, and could not have earned any more under the contract than he did elsewhere during the term, and also that the contract was voluntarily terminated by mutual consent. *Grindeman v. Woodland Shingle Co.* 240

WRITINGS:

Opinion evidence as to signatures, see EVIDENCE, 6.

Parol evidence to vary or explain, see EVIDENCE, 4, 5; TRUSTS, 5.

WRITS:

See CERTIORARI; EXECUTION; MANDAMUS.

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